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Federal Communications Commission Record

Volume 10
Issue 13

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemakings..... vii

Table of Localities..... viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xi

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 6489

Table of Cases
Volume 10
Issue 13

Case Name	Page
AT&T Corporation	6637
AT&T Corporation	6618
AT&T Corporation	6619
Amendment of Part 36 - Establishment of a Joint Board	7013
Amendment of Parts 2 and 90 -Use of Channels	6884
Amendment of Parts 21,43,74,78 and 94 - Use of Frequencies	7074
Amendment of Parts 22, 90, and 94 - Use of Signal Boosters	6681
Amendment of Parts 65 and 69 - Rate of Return Represcription	6788
Ameritech Operating Companies	6636
Assessment and Collection of Charges	7066
BPS Telephone Company	6562
Bay Springs Telephone Company, et al.	6633
Bell Atlantic Telephone Companies	6631
Boston Celtics Broadcasting Limited Partnership	6686
Bresnan Communications, et al.	6567
CCA Acquisition Corporation	6512
Cable TV Act of 1992 - Rate Regulation	6870
Cablevision Industries Corporation	6624
Cablevision of Boston Limited Partnership	6966
Community TV Corporation	6701
Connecticut Department of Public Utility Control	7025
Cox Cable Humboldt, Inc.	6644
Cox Cable Santa Barbara, Inc.	6652
Cox Cable of Greater Hartford, Inc.	6647
Crown Cable	6626
Direct Net Telecommunications, A Limited Liability Company	6560
Duchossois Communications Co., of Maryland, Inc.	6688
Expanded Interconnection with Local Telephone Company Facilities	6566
Fee Decisions of the Managing Director	6731
Fone America, Inc.	6632
Gaines, Bennett Gilbert	6589
Globafon of America, Inc.	6558
Grant of Applications	6635
Greenville Television, Inc.	6491
Implementation of Sections 3(n) and 332 of the Communications Act	6880
Insight Cablevision	6507
Johnson Broadcasting, Inc.	6494
Kern Broadcasting Corporation	6584
McElroy Electronics Corporation	6762
National Exchange Carrier Association, Inc.	6717
New Life Evangelistic Center, Inc.	6489
Orbital Communications Corporation	6572
Pacific & Eastern Digital Transmission Services, Inc.	6616
Palmetto Cablevision	6670
Paragon Cable Manhattan	6662
Paragon Cable Television	6623
Paramount Stations Group of Philadelphia, Inc.	6710
Ponce-Nicasio Broadcasting	6728
Potomac Edison Co.	6563
Preemption of Local Zoning Regulation of Satellite Earth Stations	6982
Prime Cities Broadcasters Corporation of Mississippi	6542
Rochester Telephone Corporation	6776

Case Name	Page
Secret Communications Limited Partnership	6874
Section 208 Complaints	6976
Staten Island Cable of New York City	6620
Suburban Cable TV Co., Inc.	6509
Suburban Cable TV Co., Inc.	6495
Suburban Cable TV Co., Inc.	6498
Suburban Cable TV Co., Inc.	6501
Suburban Cable TV Co., Inc.	6504
Suburban Cable TV Co., Inc.	6515
Suburban Cable TV Co., Inc.	6517
Summit Communications, Inc.	6508
Sun Cablevision, Inc.	6564
TCI Cablevision of California, Inc.	6716
TCI Cablevision of Cupertino/Los Alto, California	6699
TCI Cablevision of Decatur, Inc.	6570
TCI Cablevision of Greater Michigan, Inc.	6655
TCI Cablevision of Idaho, Inc.	6565
TCI Cablevision of Texas, Inc.	6712
TCI Cablevision of Texas, Inc.	6706
TCI Cablevision of Treasure Coast, Inc.	6571
TCI Cablevision of Washington, Inc.	6705
TCI of Central Florida	6659
TCI of Greensburg	6638
TCI of Illinois, Inc.	6695
TCI of Kansas, Inc.	6708
TCI of West Michigan	6643
TKR Cable Company of Wildwood	6703
Table of Allotments, FM, Blackstone and Dillwyn, VA	6718
Table of Allotments, FM, Bradenton and High Point, FL	6551
Table of Allotments, FM, Buffalo Gap, VA	6725
Table of Allotments, FM, Buffalo and Lamar, MS	6526
Table of Allotments, FM, Cambria, CA	6521
Table of Allotments, FM, Canovanas, Culebra and Las Piedras, VI	6673
Table of Allotments, FM, Charlotte Amalie, VI	6531
Table of Allotments, FM, Charlotte Amalie, VI	6533
Table of Allotments, FM, Cheyenne and Saratoga, WY	6722
Table of Allotments, FM, Clarendon, TX	6680
Table of Allotments, FM, Clarksdale, MS	6536
Table of Allotments, FM, Clewiston and Fort Myers Villas, FL	6548
Table of Allotments, FM, Copeland, KS	6605
Table of Allotments, FM, Driscoll, Gregory and Robstown, TX	6528
Table of Allotments, FM, Frankenmuth, MI	6607
Table of Allotments, FM, Fredericksburg and Helotes, TX	6580
Table of Allotments, FM, Grenada and Crenshaw, MS	6537
Table of Allotments, FM, Healdsburg, CA	6609
Table of Allotments, FM, Hudson, TX	6574
Table of Allotments, FM, Ingalls, KS	6604
Table of Allotments, FM, Ketchikan, AK	6557
Table of Allotments, FM, Lafayette, LA	6553
Table of Allotments, FM, Lake Havasu City, AZ	6522
Table of Allotments, FM, Leone, American Samoa	6721
Table of Allotments, FM, Littlefield, Wolfforth and Tahoka, TX	6598
Table of Allotments, FM, Madisonville, TX	6720
Table of Allotments, FM, Monticello, Perry and Quincy, FL	6595
Table of Allotments, FM, Pago Pago, American Samoa	6603
Table of Allotments, FM, Rapid City, SD	6730

Case Name	Page
Table of Allotments, FM, Romney, WV	6727
Table of Allotments, FM, Rose Hill and Trenton, NC	6611
Table of Allotments, FM, Sanger and Sherman, TX	6601
Table of Allotments, FM, Sebring and Miami, FL	6577
Table of Allotments, FM, Sun Valley, NV	6535
Table of Allotments, FM, Tallassee and Tuskegee, AL	6529
Table of Allotments, FM, Temecula, CA	6555
Table of Allotments, FM, Walla Walla and Waitsburg, WA	6539
Table of Allotments, FM, Williamstown, WV	6546
Table of Allotments, FM, Yazoo City, MS	6525
Technology Ventures International, Inc.	6617
Telecable Associates, Inc.	6541
Telephone and Data Systems, Inc.	6973
Teleport Transmission Company	6614
Time Warner Cable	6663
Time Warner Cable	6668
Time Warner Cable	6707
Time Warner Cable of New York	6520
US West Communications, Inc.	6865
US West Communications, Inc., et al.	6709
UltraCom of Marple, Inc.	6640
United Artists Enterprises, Inc.	6713
United Cable Television Corporation	6650
Warner Cable	6506
Western Union Telegraph Company	6576

Table of Cases by Delegated Authority and FCC Number

Volume 10
Issue 13

Delegated Authority or FCC Number	Page
DA 95 - 587	6494
DA 95 - 704	6620
DA 95 - 706	6623
DA 95 - 713	6624
DA 95 - 720	6626
DA 95 - 735	6638
DA 95 - 736	6640
DA 95 - 738	6643
DA 95 - 747	6631
DA 95 - 809	6644
DA 95 - 810	6647
DA 95 - 812	6650
DA 95 - 813	6652
DA 95 - 814	6655
DA 95 - 815	6659
DA 95 - 816	6662
DA 95 - 821	6632
DA 95 - 865	6633
DA 95 - 867	6635
DA 95 - 874	6636
DA 95 - 881	6637
DA 95 -1169	6489
DA 95 -1195	6541
DA 95 -1217	6531
DA 95 -1218	6533
DA 95 -1219	6535
DA 95 -1222	6553
DA 95 -1223	6506
DA 95 -1224	6507
DA 95 -1225	6508
DA 95 -1226	6509
DA 95 -1227	6495
DA 95 -1228	6498
DA 95 -1229	6501
DA 95 -1230	6504
DA 95 -1231	6512
DA 95 -1232	6515
DA 95 -1233	6517
DA 95 -1234	6520
DA 95 -1235	6567
DA 95 -1236	6522
DA 95 -1237	6536
DA 95 -1238	6555
DA 95 -1239	6537
DA 95 -1240	6491
DA 95 -1241	6542
DA 95 -1242	6525
DA 95 -1243	6539
DA 95 -1245	6526
DA 95 -1249	6546
DA 95 -1250	6548
DA 95 -1252	6528
DA 95 -1253	6529
DA 95 -1255	6551
DA 95 -1256	6604
DA 95 -1257	6521
DA 95 -1258	6605
DA 95 -1260	6563
DA 95 -1261	6574
DA 95 -1262	6557
DA 95 -1263	6595
DA 95 -1267	6576
DA 95 -1268	6558
DA 95 -1269	6560
DA 95 -1270	6718
DA 95 -1271	6598
DA 95 -1272	6562
DA 95 -1273	6577
DA 95 -1274	6607
DA 95 -1275	6609
DA 95 -1276	6580
DA 95 -1277	6611
DA 95 -1279	6565
DA 95 -1280	6564
DA 95 -1287	6566
DA 95 -1290	6570
DA 95 -1291	6571
DA 95 -1293	6686
DA 95 -1295	6663
DA 95 -1296	6695
DA 95 -1297	6699
DA 95 -1298	6701
DA 95 -1299	6703
DA 95 -1300	6601
DA 95 -1302	6603
DA 95 -1309	6572
DA 95 -1313	6668
DA 95 -1315	6680
DA 95 -1317	6720
DA 95 -1318	6614
DA 95 -1319	6616
DA 95 -1320	6617
DA 95 -1321	6618
DA 95 -1322	6619
DA 95 -1323	6673
DA 95 -1324	6670
DA 95 -1326	6705
DA 95 -1327	6706
DA 95 -1333	6721
DA 95 -1334	6722
DA 95 -1335	6725
DA 95 -1336	6727
DA 95 -1343	6709
DA 95 -1347	6707
DA 95 -1348	6708
DA 95 -1349	6728
DA 95 -1350	6710
DA 95 -1367	6731

Delegated Authority

or FCC Number	Page
DA 95 -1369	6712
DA 95 -1370	6713
DA 95 -1371	6716
DA 95 -1383	6717
FCC 95 - 93	6762
FCC 95 - 96	6776
FCC 95 - 134	6788
FCC 95 - 141	6865
FCC 95 - 150	6870
FCC 95 - 154	6874
FCC 95 - 156	6880
FCC 95 - 159	6884
FCC 95 - 161	6966
FCC 95 - 164	6973
FCC 95 - 168	6976
FCC 95 - 180	6982
FCC 95 - 189	7013
FCC 95 - 199	7025
FCC 95 - 202	7066
FCC 95 - 204	6681
FCC 95 - 214	6584
FCC 95 - 215	6688
FCC 95 - 220	6730
FCC 95 - 231	7074
FCC 95D - 6	6589

Table of Cases by Docket Number
Volume 10
Issue 13

Docket Number				Page
CC	Dkt.No.80	-	286	7013
CC	Dkt.No.91	-	141	6566
CC	Dkt.No.91	-	368	6632
CC	Dkt.No.92	-	133	6788
GEN	Dkt.No.80	-	113	7074
GEN	Dkt.No.90	-	54	7074
GN	Dkt.No.93	-	252	6880
GN	Dkt.No.93	-	252	6884
IB	Dkt.No.95	-	59	6982
MM	Dkt.No.88	-	540	6730
MM	Dkt.No.90	-	125	6589
MM	Dkt.No.90	-	524	6577
MM	Dkt.No.90	-	550	6553
MM	Dkt.No.91	-	129	6522
MM	Dkt.No.91	-	259	6673
MM	Dkt.No.92	-	59	6551
MM	Dkt.No.92	-	196	6529
MM	Dkt.No.92	-	266	6870
MM	Dkt.No.93	-	136	6548
MM	Dkt.No.93	-	164	6546
MM	Dkt.No.93	-	201	6539
MM	Dkt.No.94	-	57	6501
MM	Dkt.No.94	-	69	6537
MM	Dkt.No.94	-	73	6536
MM	Dkt.No.94	-	84	6528
MM	Dkt.No.94	-	111	6604
MM	Dkt.No.94	-	125	6580
MM	Dkt.No.94	-	137	6727
MM	Dkt.No.94	-	138	6557
MM	Dkt.No.94	-	151	6526
MM	Dkt.No.95	-	2	6531
MM	Dkt.No.95	-	4	6533
MM	Dkt.No.95	-	9	6521
MM	Dkt.No.95	-	10	6535
MM	Dkt.No.95	-	12	6574
MM	Dkt.No.95	-	15	6603
MM	Dkt.No.95	-	16	6721
MM	Dkt.No.95	-	23	6720
MM	Dkt.No.95	-	24	6680
MM	Dkt.No.95	-	27	6525
MM	Dkt.No.95	-	81	6555
MM	Dkt.No.95	-	82	6595
MM	Dkt.No.95	-	83	6598
MM	Dkt.No.95	-	85	6605
MM	Dkt.No.95	-	86	6607
MM	Dkt.No.95	-	88	6611
MM	Dkt.No.95	-	89	6609
MM	Dkt.No.95	-	98	6722
MM	Dkt.No.95	-	99	6725
MM	Dkt.No.95	-	100	6718
PP	Dkt.No.93	-	253	6884
PR	Dkt.No.89	-	553	6884
PR	Dkt.No.94	-	106	7025
WT	Dkt.No.9	-	70	6681
WT	Dkt.No.95	-	69	7066

Table of Cases by Rulemaking Number
Volume 10
Issue 13

Rulemaking Number	Page
RM - 6546	6730
RM - 7309	6673
RM - 7345	6553
RM - 7501	6577
RM - 7631	6577
RM - 7664	6522
RM - 7923	6551
RM - 7942	6673
RM - 7943	6673
RM - 7944	6673
RM - 7948	6673
RM - 8041	6529
RM - 8042	6551
RM - 8161	6548
RM - 8200	6681
RM - 8213	6539
RM - 8248	6546
RM - 8252	6539
RM - 8309	6548
RM - 8310	6548
RM - 8467	6601
RM - 8478	6528
RM - 8489	6536
RM - 8490	6537
RM - 8501	6533
RM - 8502	6531
RM - 8518	6605
RM - 8519	6604
RM - 8532	6727
RM - 8534	6580
RM - 8536	6537
RM - 8542	6557
RM - 8555	6526
RM - 8559	6574
RM - 8560	6521
RM - 8572	6535
RM - 8575	6580
RM - 8578	6720
RM - 8582	6525
RM - 8583	6680
RM - 8603	6722
RM - 8612	6725
RM - 8630	6595
RM - 8634	6598
RM - 8635	6718
RM - 8636	6607
RM - 8639	6609
RM - 8641	6611
RM - 8649	6555

Table of Cases by City
Volume 10
Issue 13

City/ State	Page
Altamonte Springs, FL	6659
Annapolis, MD	6688
Baltimore, MD	6589
Blackstone, VA	6718
Blue Bell, PA	6509
Bradenton, FL	6551
Brazona, TX	6633
Buckingham Township, PA	6495
Buffalo, MO	6526
Buffalo Gap, VA	6725
Cambria, CA	6521
Castroville, TX	6580
Charlotte, VI	6533
Charlotte, NC	6707
Charlotte Amalie, VI	6531
Charter, MI	6643
Cheyenne, WY	6722
City of Bishopville, SC	6624
Clarendon, TX	6680
Clarksdale, MS	6536
Clewiston, FL	6548
Colwyn, PA	6501
Copeland, KS	6605
Crenshaw, MS	6537
Dedham, MA	6686
Dillwyn, VA	6718
Doylestown, PA	6498
Driscoll, TX	6528
Eureka, CA	6644
Fort Myers Villas, FL	6548
Frankenmuth, MI	6607
Fredericksburg, TX	6580
Goleta, CA	6652
Greenville, MS	6631
Gregory, TX	6528
Grenada, MS	6537
Harris County, TX	6663
Haverford, PA	6640
Healdsburg, CA	6609
Helotes, TX	6580
High Point, FL	6551
Hudson, TX	6574
Indiantown, FL	6548
Ingalls, KS	6604
Jupiter, FL	6548
Ketchikan, AK	6557
Key Colony Beach, FL	6548
Key Largo, FL	6548
Lafayette, LA	6553
Lake Havasu City, AZ	6522
Lamar, MO	6526
Littlefield, TX	6598
Madisonville, TX	6720
Marathon, FL	6548
Miami, FL	6577
Monticello, FL	6595
Moorefield, WV	6563
Naples, FL	6548
New York, NY	6620
New York, NY	6662
North Huntingdon, PA	6638
Northampton Township, PA	6517
Perry, FL	6595
Petoskey, MI	6655
Philadelphia, PA	6710
Quincy, FL	6595
Rapid City, SD	6730
Robstown, TX	6528
Romney, WV	6727
Rose Hill, NC	6611
Sacramento, CA	6728
Sanger, TX	6601
Santa Barbara, CA	6652
Saratoga, WY	6722
Sebring, FL	6577
Seminole, FL	6659
Sherman, TX	6601
Sun Valley, NV	6535
Tahoka, TX	6598
Tallassee, AL	6529
Tehachapi, CA	6668
Temecula, CA	6555
Town of New Britain, PA	6504
Trenton, NC	6611
Tuskegee, AL	6529
Waitsburg, WA	6539
Walla Walla, WA	6539
Warrington, PA	6515
West Minister, CA	6623
Williamstown, WV	6546
Wolfforth, TX	6598
Woodville, FL	6595
Yazoo City, MS	6525

Subject Index
Volume10
Issue 13

Subject	Page
Adjudication	
Review Board or Commission Decision	
Misrepresentation and lack of candor	6589
Reopening of record	6589
Broadcast Radio Services - General Rules	
Licenses and permits	
Multiple ownership of broadcast stations in the same service	6584
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	6680, 6673, 6580, 6577 6574, 6531, 6533, 6535 6536, 6537, 6539, 6546 6548, 6551, 6553, 6555 6557, 6522, 6525, 6526 6528, 6529, 6720, 6721 6722, 6725, 6727, 6730 6595, 6598, 6601, 6603 6604, 6605, 6609, 6607 6611, 6718
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	6494
Cable signals in smaller markets, provisions for	6663, 6491, 6542
Network nonduplication protection	
Signals, priority of	6668, 6670
Rules	
Waiver by Commission of any provision	6663, 6491, 6542
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	6558, 6560, 6614, 6616 6617, 6618, 6619
Communications Act of 1934	6576
Common Carriers	
Extension of lines, certificate for	6558, 6560, 6614, 6616 6617, 6618, 6619
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	6686, 6728
Procedural and Administrative provisions	
Reconsiderations of actions taken by Commission	6976
Operational-Fixed Microwave Service, Private	
Technical standards	
Frequencies available, tables of assignments of	6563

Subject	Page
Practice and Procedure	
Common carriers: complaints	
Formal or informal	6976
Pleadings, briefs	

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Delegated Authority	6631
000.291 Delegated Authority	6632
000.291 Delegated Authority	6636
000.291 Delegated Authority	6637
001.045 Request for Stay	6624
001.045(d)Request for Stay	6638
001.113 Action modified or set aside by person, panel or board	6635
001.115 Application for Review	6688
024.714(d) Eligibility for partitioned licenses	6633
063.001 Contents of Applications	6558
063.001 Contents of Applications	6560
063.001 Contents of Applications	6614
063.001 Contents of Applications	6616
063.001 Contents of Applications	6617
063.001 Contents of Applications	6619
063.001 Contents of Applications	6618
069.603, Association functions	6717
073.1212 Sponsorship identification	6688
073.1942 Candidate rates	6688
073.202 FM Table of Allotments	6521
073.202 FM Table of Allotments	6522
073.202 FM Table of Allotments	6525
073.202 FM Table of Allotments	6526
073.202 FM Table of Allotments	6528
073.202 FM Table of Allotments	6529
073.202 FM Table of Allotments	6531
073.202 FM Table of Allotments	6533
073.202 FM Table of Allotments	6535
073.202 FM Table of Allotments	6536
073.202 FM Table of Allotments	6537
073.202 FM Table of Allotments	6539
073.202 FM Table of Allotments	6546
073.202 FM Table of Allotments	6555
073.202 FM Table of Allotments	6557
073.202 FM Table of Allotments	6574
073.202 FM Table of Allotments	6577
073.202 FM Table of Allotments	6580
073.202 FM Table of Allotments	6595
073.202 FM Table of Allotments	6601
073.202 FM Table of Allotments	6603
073.202 FM Table of Allotments	6604
073.202 FM Table of Allotments	6607
073.202 FM Table of Allotments	6609
073.202 FM Table of Allotments	6673
073.202 FM Table of Allotments	6680
073.202 FM Table of Allotments	6720
073.202 FM Table of Allotments	6721
073.202 FM Table of Allotments	6727
073.202 FM Table of Allotments	6730
073.202, FM Table of Allotments	6548

073.202, FM Table of Allotments 6551
073.202, FM Table of Allotments 6553
073.3540 Application for Voluntary Assignment 6688
073.3555 Multiple Ownership FCC 95-214,6/13/95 6584
073.670 COMMERCIAL LIMITS ON CHILDREN'S PROGRAMS 6686
073.670 COMMERCIAL LIMITS ON CHILDREN'S PROGRAMS 6710
073.670 COMMERCIAL LIMITS ON CHILDREN'S PROGRAMS 6728
076.007 Special Relief and must carry complaint procedures 6491
076.007 Special Relief and must-carry complaint procedures 6542
076.007 Special relief and must-carry complaint procedures 6663
076.059 Modification of television markets 6491
076.059 Modification of television markets 6542
076.059 Modification of television markets 6663
076.061 Disputes concerning carriage 6489
076.061 Disputes Concerning Carriage 6494
076.092 Network non-duplication protection 6670
076.92 Network non-duplication protection 6668
076.922 Basic Tier Rates 6638
076.922 basic tier rates 6643
076.922 Rates for Basic Service 6623
076.922 Rates for Cable Programming Service tier 6541
076.922 Rates for Cable Programming Service tier 6564
076.922 Rates for Cable Programming Service tier 6565
076.922 Rates for Cable Programming Service tier 6570
076.922 Rates for Cable Programming Service tier 6571
076.922 Rates for Cable Programming Service tier 6644
076.922 Rates for Cable Programming Service tier 6647
076.922 Rates for Cable Programming Service tier 6650
076.922 Rates for Cable Programming Service tier 6652
076.922 Rates for Cable Programming Service tier 6695
076.922 Rates for Cable Programming Service tier 6699
076.922 Rates for Cable Programming Service tier 6703
076.922 Rates for Cable Programming Service tier 6705
076.922 Rates for Cable Programming Service tier 6706
076.922 Rates for Cable Programming Service tier 6708
076.922 Rates for Cable Programming Service tier 6712
076.922 Rates for Cable Programming Service tier 6713
076.922 Rates for Cable Programming Service tier 6716
076.922 Rates for Cable Programming Service tiers 6506
076.922 Rates for Cable Programming Service tiers 6507
076.922 Rates for Cable Programming Service tiers 6512
076.922 Rates for Cable Programming Service tiers 6520
076.922 Rates for Cable Programming Service Tiers 6655
076.922 Rates for Cable Programming Service Tiers 6659
076.922 Rates for Cable Programming Service tiers 6701
076.922 Rates for Cable Programming Service tiers 6707
076.922 Rates for the basic service tier 6620
076.922 Rates for the basic service tier 6624
076.922 Rates for the basic service tier 6626
076.922 Rates for the basic service tier 6640
076.922 Rates for the basic service tier and cable programming services tier 6495
076.922 Rates for the basic service tier and cable programming services tier 6498
076.922 Rates for the basic service tier and cable programming services tier 6501
076.922 Rates for the basic service tier and cable programming services tier 6504

076.922 Rates for the basic service tier and cable programming services tier 6508
076.922 Rates for the basic service tier and cable programming services tier 6509
076.922 Rates for the basic service tier and cable programming services tier 6515
076.922 Rates for the basic service tier and cable programming services tier 6517
076.923 Rates for equipment and installation 6620
076.923 Rates for equipment and installation 6626
076.923 Rates for equipment and installation 6638
076.923 Rates for equipment and installation 6640
076.923 Rates for Equipment and Installations 6623
076.923 Rates for equipment and installations 6624
076.933 Franchising Authority Review of basic cable rates and equipment costs 6638
076.937 Burden of proof 6640
076.942 Refunds 6638
076.942 refunds 6643
076.944 Commission Review of Franchising Authority Decision 6640
076.944 Commission Review of Franchising Authority Decisions 6620
076.944 Commission Review of Franchising Authority Decisions 6623
076.944 Commission Review of Franchising Authority Decisions 6624
076.944 Commission Review of Franchising Authority Decisions 6626
076.944 Commission Review of Franchising Authority Rate Decision 6638
076.944 Commission review of franchising authority rate decision 6643
090.219 Use of signal boosters 6681
094.065 Frequencies 6563
200.214 Extension of Lines 6619
300.154 Provisions Relating to the Commission 6576
300.214 Extension of Lines 6558
300.214 Extension of Lines 6560
300.214 Extension of Lines 6614
300.214 Extension of Lines 6616
300.214 Extension of Lines 6617
300.214 Extension of Lines 6618
300.503(b) FORFEITURES (NAL) 6686
300.503(b) FORFEITURES (NAL) 6710
300.503(b) FORFEITURES (NAL) 6728
300.534 Carriage of local commercial television signals 6489
300.534 Carriage of local commercial television signals 6491
300.534 Carriage of Local Commercial Television Signals 6494
300.534 Carriage of local commercial television signals 6542
300.534 Carriage of local commercial television signals 6663

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Complaint of New Life Evangelistic Center, Inc. against Douglas Communications Corporation II — CSR-4074-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1995; Released: June 12, 1995

By the Cable Services Bureau:

1. Douglas Communications Corporation II ("Douglas'), operator of sixteen cable systems serving in Missouri has requested a stay[1] and reconsideration of the decision in the captioned proceeding insofar as that decision ordered it to add the signal of television broadcast station KNLJ (Ch. 25), Jefferson City, Missouri to its Otterville and Keytesville, Missouri systems.[2] An opposition to the petition for stay was filed by KNLJ which requested that it also be incorporated by reference as an opposition to the petition for reconsideration. Douglas has replied.

2. In support of its request, Douglas states that it will suffer irreparable financial injury if forced to add KNLJ to its Otterville and Keytesville systems and it reiterates the arguments it raised in this regard in its opposition to KNLJ's original complaint. It states that the extremely small size of the two systems[3] would result in investments of at least $12.64 and $8.64 per subscriber for Otterville and Keytesville, an investment the systems would have great difficulty absorbing. Douglas goes on to state that KNLJ does not provide a good quality signal to the principal headends for the Otterville and Keytesville systems and it submits the results of signal quality tests performed for the two systems consisting of data from four signal level readings taken over a 24-hour period. Douglas maintains that this data demonstrates, consistent with Commission requirements, that KNLJ's signal strength is substantially below the minimum required level of -45 dBm for UHF stations. As a result, Douglas maintains that KNLJ is not a must-carry station pursuant to the Commission's rules and is not entitled to carriage on its Otterville and Keytesville systems.

3. In its opposition, KNLJ states that Douglas' arguments herein are based on the same faulty signal quality premise it argued in its original complaint. KNLJ points to a technical report prepared by Mr. Robert Preston Yeoman which indicates that it can achieve a good quality signal at the Otterville and Keytesville headends given the proper technical equipment.[4] KNLJ argues further that Douglas' petition for stay, which appears to be a petition for reconsideration, is untimely[5] and should not be considered in lieu of a clear and unequivocal order to carry KNLJ. Finally, KNLJ avers that Douglas cannot claim that financial damage is irreparable harm and it cites a decision of the Commission's Mass Media Bureau[6] which states that "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim or irreparable injury."

4. In reply, Douglas maintains that it has adequately shown, using good engineering practices, that KNLJ does not provide a good quality signal at its systems' headends. While KNLJ's technical showing appears to suggest that a good quality signal can be received, Douglas argues that this is only after extraordinary technical measures are employed.[7] Moreover, nowhere does KNLJ offer to compensate Douglas for any of the costs associated with these extraordinary measures. This, it is argued, is clearly in contravention of the Commission's clear statement that it is the broadcaster, and not the cable operator, who shall be responsible for the cost of any specialized equipment necessary to provide a good quality signal.[8] Finally, Douglas states that the threat of irreparable financial harm is quite real and since there is no possibility that the Commission would order the system be reimbursed if it went through the unnecessary expense of adding and then deleting KNLJ.

5. Treating Douglas' request as a effectively a new petition, we will grant the relief requested.[9] Under the Cable Television Consumer Act of 1992,[10] a UHF television station, such as KNLJ, must to place a signal level of at least -45 dBm over a subject cable system's headend in order to be eligible for mandatory carriage. In this instance, based on the information now before us, we are unable to conclude the KNLJ does so. In making this finding, however, we recognize that KNLJ has the right to provide an improved signal to Douglas' headend at which point it will be required to commence carriage of KNLJ.

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[1] In light of our action herein, we need not make a ruling on Douglas' request for an emergency stay.

[2] *New Life Evangelistic Center, Inc. against Douglas Cable Communications*, 10 FCC Rcd 9 (1994). The Commission's original action ordered Douglas to add KNLJ to its systems serving Clark, Franklin, Freeburg, Hallsville, Higbee, Iberia, Keytesville, Lake Mykee, New Bloomfield, New Franklin, Otterville, Russellville, Stover, Sturgeon, Taos, Vienna and Westphalia, Missouri. Douglas' petition herein, however, applies only to Otterville and Keytesville, Missouri.

[3] The Otterville and Keytesville systems have 134 and 196 subscribers, respectively.

[4] The technical report provided by KNLJ indicates that the cost to Douglas at each system for technical modifications to achieve a good quality signal at each headend will run anywhere from $450 to $2250 for a channel processor and $1200 to $1600 for all other relevant equipment (i.e. antenna, preamp, etc.).

[5] Grant of KNLJ's must carry complaint was released December 27, 1994. Douglas' petition for stay was not filed until March 1, 1995.

[6] *Arnold L. Chase*, 4 FCC RCD 5085 (1989).

[7] Douglas states that even KNLJ admits that even using extraordinary measures, its signal would only deliver a signal level of between -57.45 dBm and -52.95 dBm to the Keytesville headend, a level well below that required.

[8] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Clarification Order*, 8 FCC Rcd 4142, 4144 (1993).

[9] As noted by KNLJ, as a reconsideration petition Douglas' filing was untimely. *See* 47 C.F.R. §1.104(b).

[10] Pub. L. No.102-395, 106 Stat. 1460 (1992)

6. The engineering data submitted by Douglas confirms its contention that KNLJ's signal quality at the systems' designated headends is not sufficient to entitle the station to mandatory carriage on Douglas's cable systems serving Otterville and Keytesville, Missouri.[11] The Commission has stated that "it is the television station's obligation to bear the cost associated with delivering a *good quality signal* to the system's principal headend (emphasis supplied)."[12] If as KNLJ suggests, it can provide a good quality signal to Douglas' Otterville and Keytesville systems with the use of the proper equipment, then it is the obligation of KNLJ, and not Douglas to pay for the expense to do so.

7. Accordingly, the petition filed March 1, 1995, in the captioned proceeding on behalf of Douglas Communications Corporation II IS GRANTED to the extent that Douglas Communication is not now required to carry the signal of KNLJ on its systems in Otterville and Keytesville, Missouri. Upon KNLJ providing the necessary equipment to receive its signal, however, Douglas shall have sixty days to add it to its signal carriage complement.

8. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson,
Deputy Chief, Cable Services Bureau

[11] *See* 47 U.S.C. §535(g)(4).
[12] *Report and Order in MM Docket 92-259*, 8 FCC Rcd 2965 (1993), paragraph 104.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Greenville Television, Inc., CSR-4053-A
Greenville, Mississippi

For Modification of Television
Broadcast Station WXVT's ADI

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1995; Released: June 12, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Greenville Television, Inc. ("WXVT"), licensee of television station WXVT(TV), Greenville, Mississippi (CBS, channel 15), has filed the captioned petition for special relief seeking to include the City of Grenada, Mississippi within the Greenwood-Greenville, Mississippi "area of dominant influence" ("ADI") for purposes of the cable television mandatory broadcast signal carriage rules. No oppositions to this petition have been filed.

BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its *Report and Order*, Docket 92-259,[2] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
>
> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order*, MM Docket 92-259, 8 FCC Rcd 2965, 2976-2977 (1993) (*"Must Carry Order"*).

[3] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's *Description of Methodology*.

[5] Communications Act of 1934, as amended, § 614 (h)(1)(C)(ii), 47 U.S.C. § 534(h)(l)(C)(ii).

[6] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97 (1992).

5. The Commission provided guidance in its *Report and Order in Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations. 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

MARKET FACTS AND PETITIONER'S ARGUMENTS

8. The City of Grenada, Mississippi is presently assigned to the Columbus-Tupelo, Mississippi ADI. WXVT is located in Greenville, Mississippi in the Greenwood-Greenville, Mississippi ADI. Grenada borders the Greenwood-Greenville ADI to the east. The petitioner states that Grenada was formerly included in the Greenwood-Greenville ADI. In its petition, WXVT asks the Commission to modify the Greenwood-Greenville ADI to include Grenada for purposes of the cable television mandatory broadcast signal carriage rules.

9. WXVT asserts that it satisfies each of the four market modification criteria set forth in the 1992 Cable Act and the Commission's rules. The petitioner states that it has been carried on the Grenada Cable System since November of 1980, when it first went on the air. Second, the petitioner maintains that it provides local service to the Grenada area, covering events in Grenada itself and throughout the county. Specifically, WXVT asserts that it provides local news, weather, and sports programming. The petitioner contends, for example, that it regularly airs Grenada-related stories on all of its news programs and that the station's early morning news broadcasts provide local agricultural market information which is particularly important to farmers in the Grenada area and is generally not available from other sources. WXVT also states that it is the only station to provide local radar weather information. In addition, the petitioner asserts that its 30-minute public affairs program covers events specific to Grenada viewers and the station claims that it is the primary source of public service announcements for activities throughout the Grenada area. WXVT also maintains that, unlike Tupelo market stations, it provides extensive coverage of local high school sports, including footage from games. The petitioner further states that it provides coverage of sporting events and other activities involving two colleges in the area. While WXVT notes that another station in the Greenwood-Greenville ADI, WABG(TV), also provides local coverage of area events, the petitioner contends that WXVT is "more attentive" to the Grenada area. Finally, the petitioner argues that local viewing patterns justify inclusion of Grenada in the Greenwood-Greenville ADI. Citing the 1993 Arbitron county coverage report, WXVT states that it enjoys substantial viewership and is the third most watched station in the Grenada area.

ANALYSIS AND DECISION

10. WXVT has provided sufficient evidence to justify its market modification request and it will accordingly be granted. The station has been carried on the Grenada Cable System since November of 1980. With respect to local service, WXVT has demonstrated that it provides locally oriented programming to Grenada area residents, including news, weather and sports. Although WXVT's Grade B contour does not encompass the City of Grenada, the station's showing with respect to local programming is sufficient to

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[7] *Id.* at 2977 (emphasis in original).
[8] Must Carry Order, 8 FCC Rcd at 2977, n.139.
[9] 47 C.F.R. § 76.59.
[10] *Must Carry Order*, 8 FCC Rcd at 2981.

satisfy the second factor of the four-prong test. The petitioner acknowledges that WABG(TV) in the Greenwood-Greenville ADI also covers local events in the Grenada area. However, we do not believe that Congress intended for the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. As to viewing patterns, the most recent Arbitron county coverage reports of 1993-94 confirm WXVT's assertion that it achieves substantial viewership. The station receives a total viewing share of 8 and a net weekly circulation of 39. These figures are comparable to those achieved by the CBS affiliate in the Columbus-Tupelo ADI.[11]

ORDER

11. In view of the foregoing, we find that grant of WXVT's petition is in the public interest.[12]

12. Accordingly, IT IS ORDERED, pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended, (47 U.S.C. 534(h)(1)(C)) and Section 76.59 of the Commission's Rules (47 CFR Section 76.59), that the petition for special relief (CSR-4053-A), filed August 26, 1993 by Greenville Television, Inc. IS GRANTED. WXVT shall notify the relevant cable systems in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within sixty (60) days of such notification.

13. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] Nielsen also includes the area in question as within the Greenwood-Greenville "DMA", its equivalent of Arbitron's ADI. *Television & Cable Factbook*, Vol. 63, p. A-615 (1995). This provides some additional support for the conclusion that it is reasonable to include Grenada with the market of WXVT.

[12] The City of Grenada also remains within the Columbus-Tupelo, Mississippi ADI.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Johnson Broadcasting Inc. against Prime Cable of Fort Bend L.P. and Prime Cable Income Partners, L.P.[1]

CSR-4396-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1995; Released: June 12, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On September 28, 1994, Johnson Broadcasting, Inc. (hereinafter "Station KNWS"), licensee of Station KNWS-TV (Ind., Ch. 51), Katy, Texas, filed the captioned complaint against Prime Cable of Fort Bend, L.P. and Prime Cable Partners, L.P. (hereinafter "Prime Cable") for the latter's failure to comply with channel positioning requirements of the Commission's Rules and the 1992 Cable Act on its eleven (11) cable systems serving the Houston, Texas ADI.[2] On November 22, 1994, Prime cable filed an opposition to Station KNWS-TV's complaint, to which Station KNWS-TV filed its reply on December 7, 1994.

BACKGROUND

2. Station KNWS-TV filed a previous similar complaint on January 14, 1994 (CSR-4189-M) with the Commission. Station KNWS-TV claimed in that proceeding that Prime Cable had unlawfully refused to carry its signal on cable channel 2 on the systems serving the Houston, Texas ADI. It also requested the Commission to impose a forfeiture against Prime Cable for violation of the Commission's rules.[3] In the instant petition, Station KNWS-TV, in essence, reiterates its previous complaint by requesting that its signal now be carried on either Channels 9 or 14 on Prime Cable's systems. It states further that Prime Cable has refused to negotiate placement of Station KNWS-TV in a more desirable channel position on its systems.

3. In its opposition, Prime Cable states that Station KNWS-TV's latest complaint is without merit, and that the Commission's rules do not require the system to carry Station KNWS-TV on either channels 9 or 14, for the same reasons that the rules did not require Prime Cable to carry Station KNWS-TV on channel 2 in the earlier petition. In addition, the Commission's prior action did not support the imposition of a forfeiture against Prime Cable. Prime Cable further states that it has not violated any Commission rule and that Station KNWS-TV's complaint should be dismissed.

4. In its reply to Prime Cable's opposition to the instant case, Station KNWS-TV asserts that Prime Cable has sought to keep Station KNWS-TV off its cable systems. It argues that although the system complied with the Commission's previous order, Prime Cable has failed to make any real effort to negotiate placement of KNWS-TV on a less disadvantageous cable channel nor has it offered any alternatives.

CHANNEL POSITION REQUEST

5. Section 76.57 of the Commission's Rules allows a commercial broadcast station to elect carriage on the cable system channel on which the station is broadcast over-the-air, the channel on which the station was carried on July 19, 1985, or on the channel on which the station was carried on January 1, 1992. Station KNWS-TV's signal is not broadcast over-the-air on channel 2, but instead is broadcast on channel 51. As noted in the previous complaint (CSR-4189-M), Station KNWS-TV was a new television station that was not carried by Prime Cable's systems on July 19, 1985, or January 1, 1992. Therefore, it's only rights to on channel carriage rest with the channel on which it broadcasts over-the-air. Prime Cable is in compliance with the Commission's must carry regulations in that it is carrying Station KNWS-TV on cable channel 51 as required. As a result, Station KNWS-TV's channel position request is unfounded.

ORDER

6. Accordingly, IT IS ORDERED, that the complaint filed by Johnson Broadcasting, Inc. against Prime Cable IS DENIED in accordance with §614(b)(6) (47 U.S.C. §534) of the Communications Act of 1934, as amended.

7. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[1] Prime Cable of Fort Bend, L.P. and Prime Cable Income Partners, L.P. have the same managing general partner, Prime Venture I, Inc. which manages the cable systems of the two entities jointly.

[2] Since the filing of Station KNWS-TV's complaint, Prime Cable in its opposition to the instant petition, states that it has combined its Sugar Land and Richmond headends, therefore, it now has ten (10) rather than eleven (11) cable systems in the Houston, Texas area.

[3] On July 26, 1994, the Commission issued its MO&O (DA-94-796) which granted Station KNWS-TV's request for carriage but denied its request for channel positioning. On September 9, 1994, in compliance with the Commission's Order, Prime Cable commenced carriage of Station KNWS-TV on Channel 51, the channel which Station KNWS-TV broadcasts over-the-air.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID No. PA2146
Buckingham Township, Pennsylvania

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in Buckingham Township, Pennsylvania ("Buckingham"), community unit identification ("CUID") number PA2146. Suburban has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Suburban's CPS tier price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint in the Buckingham franchise area was completed and served on Suburban on December 27, 1993. The Commission received the complaint on January 4, 1994.

5. Suburban initially attempted to justify its CPS price through an FCC Form 393 filed on June 24, 1994. It filed a revised Form 393 on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[11]

DISCUSSION

6. In its amended benchmark filing of February 6, 1995, Suburban calculated a maximum permitted price for the CPS tier of $11.04 per month. However, Suburban's actual price for the CPS tier was $12.15 per month. Thus, Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, we have found the following errors that require a recalculation of Suburban's maximum permitted CPS price:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Suburban did not correctly account for its income tax expense. By placing entries in these columns, Suburban confirms that it is a tax-paying entity (i.e., a "C" corporation). Suburban, however, has not included the full allowance for federal income taxes applicable to the return on its investment in property, plant and equipment asso-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Suburban has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Suburban implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Suburban's price for the period after May 14, 1994 may be required to reflect the fact that Suburban's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

ciated with the provision, installation, and servicing of customer premises equipment. We therefore recalculated the federal income tax allowance on the basis of a 34% corporate tax rate. Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment).[12] Application of the gross-up principle to a 34% tax rate led to an allowance for federal income taxes at .51515 of the return on investment allowed.[13] Application of the grossed-up tax provision resulted in an increase in the federal tax provision on Schedule A from the reported $32,080.66 to $93,649.00 (at Schedule A, Col. G, Total) and on Schedule C from $30,574.19 to $89,252.00 (at Schedule C, Col. G, Total). These adjustments in turn increased the monthly equipment cost unbundled by Suburban on Line 301 of Worksheet 3, Part II from $5,344.65 to $5,643.75, thereby causing a decrease in its maximum permitted charge for CPS.

b. Suburban calculated its maximum permitted price on the basis of 23 CPS channels. Suburban, however, provided along with its February 6 filing a channel line-up, as of October 6, 1993, which shows only 22 CPS channels. We therefore reduced the number of channels on the CPS tier entered on Form 393, Part I and Form 393, Part II, Worksheet 1, Line 102B from 23 to 22, and we reduced the number of rate-regulated channels used in calculating the benchmark on Form 393, Part II, Worksheet 1, Line 121 from 42 to 41, resulting in a change in the Benchmark Channel Rate on Line 121 from .532 to .541.

c. Suburban calculated the Inflation Adjustment Factor on Form 393, Part II, Worksheet 1 as of the end of January 1994 using data released by the Department of Commerce on March 31, 1994. However, Suburban incorrectly entered on Line 124 that 16 months, rather than 15 months, had passed between the end of the third quarter of 1992 and the end of December 1993, the last whole month preceeding the last legal filing date for Suburban's 393 submission. Suburban's calculation of the Inflation Adjustment is thus incorrect. We must therefore recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1 to reflect the correct number of months on Line 124. Additionally, we must base the adjustment on the most accurate data currently available on the date for which Suburban filed.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date Suburban should have used used in justifying its rates, of 1.034.

7. Since Suburban has failed to demonstrate that its price of $12.15 for the CPS tier was not unreasonable, we will set a price for this tier, incorporating the adjustments discussed above. These adjustments reduce the maximum permitted CPS tier price for the community of Buckingham from $11.04, as Suburban calculated in its Form 393 filing, to $10.58.

CONCLUSIONS

8. Upon review of the record herein and incorporating the adjustments discussed above, we conclude that Suburban's showing for the franchise area serving Buckingham Township, Pennsylvania, CUID No. PA2146, supports a maximum permitted CPS tier price of $10.58 per month (plus franchise fee) for the period from January 4, 1994 to May 14, 1994.[15] We further determine that with respect to this franchise area we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that for the period after May 14, 1994, Suburban must reflect in its Form 1200 rate filing for the franchise area addressed in this Order the fact that Suburban's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Suburban's price for the period after May 14, 1994, upon completion of our review of Suburban's FCC Form 1200 rate filing.

10. We further conclude that Suburban has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Suburban of its obligation to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Buckingham Township, Pennsylvania, for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by Suburban Cable TV Co., Inc., in Buckingham Township, Pennsylvania, CUID No. PA2146, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

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[12] *First Order on Reconsideration, Second Report and Order, Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[13] The income tax gross-up allowance of .51515 applied to the operator's allowed return on investment was calculated as .34/(1-.34).

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Suburban and the modifications described herein. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Suburban Cable TV Co., Inc., with respect to Buckingham Township, Pennsylvania, CUID No. PA2146, for the period beginning with the filing of the first valid complaint on January 4, 1994, and ending on May 14, 1994, justifies a maximum price of $10.58 per month (plus franchise fee) for its cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Suburban Cable TV Co., Inc., shall refund to subscribers in the franchise area serving Buckingham Township, Pennsylvania, CUID No. PA2146, that portion of the amounts paid for cable programming service for the period from January 4, 1994,[17] to May 14, 1994, that exceeded $10.58 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall promptly determine the overcharges to CPS subscribers in the franchise area serving Buckingham Township, Pennsylvania for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Suburban Cable TV Co., Inc., shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its franchise area serving Buckingham Township, Pennsylvania, CUID No. PA2146, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

16. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise area serving Buckingham Township, Pennsylvania, CUID No. PA2146.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Suburban Cable TV Co., Inc., shall not be required to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Buckingham Township, Pennsylvania, CUID No. PA2146, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc.
Township of Doylestown, Pennsylvania

CUID Nos. PA1948, PA2499

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in the Township of Doylestown, Pennsylvania ("Doylestown"), community unit identification ("CUID") numbers PA1948 and PA2499.[1] Suburban has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Suburban's CPS tier price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

PROCEDURAL MATTERS

4. The first valid CPS complaint in the Doylestown franchise area was completed and served on Suburban on December 7, 1993. The Commission received the complaint on December 14, 1993.

5. Suburban initially attempted to justify its CPS price through an FCC Form 393 filed on June 24, 1994. Suburban refiled a Form 393 on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

DISCUSSION

6. In its amended benchmark filing of February 6, 1995, Suburban calculated a maximum permitted price for the CPS tier of $11.50 per month. Suburban's actual price for the CPS tier was $12.15 per month. Thus, Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable. Moreover, we have found the following errors that require a recalculation of Suburban's maximum permitted CPS price:

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[1] The initial complainant filed FCC Form 329 complaining about cable rates in the Township of Doylestown, Pennsylvania, CUID No. PA2499. The operator filed Form 393 for the Township of Doylestown, Pennsylvania, CUID No. PA1948, in response to the initial complaint and two subsequent complaints. The operator confirmed that the two CUID numbers identify the same community and franchise area.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Suburban has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Suburban implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Suburban's price for the period after May 14, 1994 may be required to reflect the fact that Suburban's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Suburban did not correctly account for its income tax expense. By placing entries in these columns, Suburban confirms that it is a tax-paying entity (i.e., a "C" corporation). Suburban, however, has not included the full allowance for federal income taxes applicable to the return on its investment in property, plant and equipment associated with the provision, installation, and servicing of customer premises equipment. We therefore recalculated the federal income tax allowance on the basis of a 34% corporate tax rate. Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment).[13] Application of the gross-up principle to a 34% tax rate led to an allowance for federal income taxes at .51515 of the return on investment allowed.[14] Application of the grossed-up tax provision resulted in an increase in the federal tax provision on Schedule A from the reported $16,073.78 to $46,922.00 (at Schedule A, Col. G, Total) and on Schedule C from $37,553.49 to $109,624.00 (at Schedule C, Col. G, Total). These adjustments in turn increased the monthly equipment cost unbundled by Suburban on Line 301 of Worksheet 3, Part II from $5,704.89 to $6,224.75, thereby causing a decrease in its maximum permitted charge for CPS.

b. Suburban calculated its maximum permitted price on the basis of 23 CPS channels. Suburban, however, provided along with its February 6 filing a channel line-up which shows only 22 CPS channels. We therefore adjusted Form 393, Part I and Form 393, Part II, Worksheet 1, Line 102B to include only 22 channels on the CPS tier, and we reduced the number of channels used in calculating the Benchmark Channel Rate on Form 393, Part II, Worksheet 1, Line 121 from 42 to 41.

7. Since Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable, we will set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as to which Suburban filed.[15] On its amended Form 393, Suburban calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Suburban used in justifying its rates, of 1.030.

CONCLUSIONS

8. Upon review of the record herein and incorporating the adjustments discussed above, we conclude that Suburban's showing for the franchise area serving the Township of Doylestown, Pennsylvania, CUID Nos. PA1948 and PA2499, supports a maximum permitted CPS tier price of $11.04 per month (plus franchise fee) for the period from December 14, 1993 to May 14, 1994.[16] We further determine that with respect to this franchise area we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that for the period after May 14, 1994, Suburban must reflect in its Form 1200 rate filing for the franchise area addressed in this Order the fact that Suburban's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Suburban's price for the period after May 14, 1994, upon completion of our review of Suburban's FCC Form 1200 rate filing.

10. We further conclude that Suburban has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Suburban of its obligation to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Doylestown for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by Suburban Cable TV Co., Inc., in the Township of Doylestown, Pennsylvania, CUID Nos. PA1948 and PA2499, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Suburban Cable TV Co., Inc., with respect to the Township of Doylestown, Pennsylvania, CUID Nos. PA1948 and PA2499, for the period beginning with the filing of the first valid complaint on December 14, 1993, and ending on May 14, 1994, justifies a maximum price of $11.04 per month (plus franchise fee) for its cable programming service tier.

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[13] *First Order on Reconsideration, Second Report and Order, Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] The income tax gross-up allowance of .51515 applied to the operator's allowed return on investment was calculated as .34/(1-.34).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Suburban and the modifications described herein. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Suburban Cable TV Co., Inc., shall refund to subscribers in the franchise area serving the Township of Doylestown, Pennsylvania, CUID Nos. PA1948 and PA2499, that portion of the amounts paid for cable programming service for the period from December 14, 1993,[18] to May 14, 1994, that exceeded $11.04 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall promptly determine the overcharges to CPS subscribers in the franchise area serving the Township of Doylestown, Pennsylvania for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Suburban Cable TV Co., Inc., shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its franchise area serving the Township of Doylestown, Pennsylvania, CUID Nos. PA1948 and PA2499, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

16. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise area serving the Township of Doylestown, Pennsylvania, CUID Nos. PA1948 and PA2499.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Suburban Cable TV Co., Inc., shall not be required to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving the Township of Doylestown, Pennsylvania, CUID Nos. PA1948 and PA2499, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. §76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID No. PA1703
Colwyn, Pennsylvania

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in Colwyn, Pennsylvania, community unit identification ("CUID") number PA1703. Suburban has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Suburban's CPS tier price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint in the Colwyn franchise area was completed and served on Suburban on February 11, 1994. The Commission received the complaint on February 18, 1994.

5. Suburban initially attempted to justify its CPS price through an FCC Form 393 filed on March 21, 1994. It amended its justification on June 24, 1994 in response to a Cable Services Bureau order citing common deficiencies observed in benchmark filings generally;[11] on June 30, 1994 revising the cover sheet (Part I of the filing) to correct the June 24 revision; and on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

DISCUSSION

6. In its amended benchmark filing of February 6, 1995, Suburban calculated a maximum permitted price for the CPS tier of $11.38 per month. Suburban's actual price for the CPS tier was $11.02 per month. However, we have found the following errors that require a recalculation of Suburban's maximum permitted CPS price:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Suburban did not correctly account for its income tax expense. By placing entries in these columns, Suburban confirms that it is a

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Suburban has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Suburban implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Suburban's price for the period after May 14, 1994 may be required to reflect the fact that Suburban's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

tax-paying entity (i.e., a "C" corporation). Suburban, however, has not included the full allowance for federal income taxes applicable to the return on its investment in property, plant and equipment associated with the provision, installation, and servicing of customer premises equipment. We therefore recalculated the federal income tax allowance on the basis of a 34% corporate tax rate. Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment).[13] Application of the gross-up principle to a 34% tax rate led to an allowance for federal income taxes at .51515 of the return on investment allowed.[14] Application of the grossed-up tax provision resulted in an increase in the federal tax provision on Schedule A from the reported $55,682.77 to $290,383 (at Schedule A, Col. G, Total) and on Schedule C from $63,562.63 to $185,551.00 (at Schedule C, Col. G, Total). These adjustments in turn increased the monthly equipment cost unbundled by Suburban on Line 301 of Worksheet 3, Part II from $1,012.60 to $1,171.67, thereby causing a decrease in its maximum permitted charge for CPS.

b. Suburban calculated its maximum permitted price on the basis of 26 CPS channels. Suburban, however, provided along with its February 6 filing a channel line-up which shows only 23 CPS channels. We therefore adjusted Form 393, Part I and Form 393, Part II, Worksheet 1, Line 102B to include only 23 channels on the CPS tier, and we reduced the number of channels used in calculating the Benchmark Channel Rate on Form 393, Part II, Worksheet 1, Line 121 from 46 to 43, resulting in a change in the Benchmark Channel Rate on Line 121 from .494 to .525.

7. Because Suburban has failed to demonstrate that its price of $11.02 for the CPS tier was not unreasonable, we will set a maximum permitted price for this tier, incorporating the adjustments discussed above. These adjustments reduce the maximum permitted CPS tier price in the community of Colwyn from $11.38, as Suburban calculated in its Form 393 filing, to $10.76.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Suburban's showing for the franchise area serving Colwyn, Pennsylvania, CUID No. PA1703, supports a maximum permitted CPS tier price of $10.76 per month (plus franchise fee) for the period from February 18, 1994 to May 14, 1994.[15] We further determine that with respect to this franchise area we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that for the period after May 14, 1994, Suburban must reflect in its Form 1200 rate filing for the franchise area addressed in this Order the fact that Suburban's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Suburban's price for the period after May 14, 1994, upon completion of our review of Suburban's FCC Form 1200 rate filing.

10. We further conclude that Suburban has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Suburban of its obligation to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Colwyn, Pennsylvania, for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Suburban Cable TV Co., Inc., in Colwyn, Pennsylvania, CUID No. PA1703, IS GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Suburban Cable TV Co., Inc., with respect to Colwyn, Pennsylvania, CUID No. PA1703, for the period beginning with the filing of the first valid complaint on February 18, 1994, and ending on May 14, 1994, justifies a maximum price of $10.76 per month (plus franchise fee) for its cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Suburban Cable TV Co., Inc., shall refund to subscribers in the franchise area servin~ Colwyn, Pennsylvania, CUID No. PA1703, that portion of the amounts paid for cable programming service for the period from February 18, 1994,[17] to May 14, 1994, that exceeded $10.76 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

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[13] *First Order on Reconsideration, Second Report and Order, Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] The income tax gross-up allowance of .51515 applied to the operator's allowed return on investment was calculated as .34/(1-.34).

[15] This finding is based solely on the representations of Suburban and the modifications described herein . Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

14. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall promptly determine the overcharges to CPS subscribers in the franchise area serving Colwyn, Pennsylvania for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Suburban Cable TV Co., Inc., shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its franchise area serving Colwyn, Pennsylvania, CUID No. PA1703, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

16. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise area serving Colwyn, Pennsylvania, CUID No. PA1703.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Suburban Cable TV Co., Inc., shall not be required to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Colwyn, Pennsylvania, CUID No. PA1703, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID No. PA1947
Town of New Britain, Pennsylvania

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in the Town of New Britain, Pennsylvania ("New Britain"), community unit identification ("CUID") number PA1947. Suburban has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Suburban's CPS tier price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint in the New Britain franchise area was completed and served on Suburban on December 28, 1993. The Commission received the complaint on January 6, 1994.

5. Suburban initially attempted to justify its CPS price through an FCC Form 393 filed on May 6, 1994. It amended its justification on June 24, 1994 in response to a Cable Services Bureau order citing common deficiencies observed in benchmark filings generally.[11] On June 30, 1994 it filed to revise the cover sheet (Part I of the filing) to correct the June 24 revision.

DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Suburban calculated a maximum permitted price for the CPS tier of $11.74 per month. Upon review of this filing, we have found no apparent errors that would require a recalculation of the maximum permitted rate. However, Suburban's actual price for the CPS tier was $12.15 per month. Thus, Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable.

CONCLUSIONS

7. Upon review of the record herein, we conclude that Suburban's showing for the franchise area serving the Town of New Britain, Pennsylvania CUID No. PA1947, supports a maximum permitted CPS tier price of $11.74 per month (plus franchise fee) for the period from January

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Suburban has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Suburban implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Suburban's price for the period after May 14, 1994 may be required to reflect the fact that Suburban's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

6, 1994 to May 14, 1994.[12] We further determine that with respect to this franchise area we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that for the period after May 14, 1994, Suburban must reflect in its Form 1200 rate filing for the franchise area addressed in this Order the fact that Suburban's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Suburban's price for the period after May 14, 1994, upon completion of our review of Suburban's FCC Form 1200 rate filing.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by Suburban Cable TV Co., Inc., in the Town of New Britain, Pennsylvania, CUID No. PA1947, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED that the benchmark filing submitted by Suburban Cable TV Co., Inc., with respect to the Town of New Britain, Pennsylvania, CUID No. PA1947, for the period beginning with the filing of the first valid complaint on January 6, 1994, and ending on May 14, 1994, justifies a maximum price of $11.74 per month (plus franchise fee) for its cable programming service tier.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Suburban Cable TV Co., Inc., shall refund to subscribers in the franchise area serving the Town of New Britain, Pennsylvania, CUID No. PA1947, that portion of the amounts paid for cable programming service for the period from January 6, 1994,[13] to May 14, 1994, that exceeded $11.74 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

12. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall promptly determine the overcharges to CPS subscribers in the franchise area serving the Town of New Britain, Pennsylvania for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

13. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Suburban Cable TV Co., Inc., shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its franchise area serving the Town of New Britain, Pennsylvania, CUID No. PA1947, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

14. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise area serving the Town of New Britain, Pennsylvania, CUID No. PA1947.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] This finding is based solely on the representations of Suburban listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[13] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. §76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Warner Cable — CUID Nos. OH0773 (Magadore)
OH1003 (Wadsworth)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1995; Released: June 12, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to or lower than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Insight Cablevision CUID No. CA1224 (Claremont)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1995; Released: June 12, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Summit Communications, Inc. CUID No. WA0339 (Duvall)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1995; Released: June 12, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. In addition, the complaint objects to Operator's rates for equipment. Rates for equipment used to receive the basic tier are regulated as part of the regulation of rates for the basic tier, and thus are generally outside the Commission's jurisdiction.[2] This definition includes all equipment in a subscriber's home that is used to receive the basic service tier, regardless of whether such equipment is additionally used to receive a CPS tier.[3] Complaints concerning charges for equipment used to receive the basic tier should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

4. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

[2] Cable Act of 1992, Section 623(b)(3), 47 U.S.C. § 543(b)(3).

[3] 47 C.F.R. § 76.923(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID No. PA1991
Blue Bell, Pennsylvania

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in Blue Bell, Pennsylvania, community unit identification ("CUID") number PA1991. Suburban has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Suburban's CPS tier price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint in the Blue Bell franchise area was completed and served on Suburban on September 24, 1993. The Commission received the complaint on October 5, 1993.

5. Suburban initially attempted to justify its CPS price through an FCC Form 393 filed on December 13, 1993. It amended its justification on June 24, 1994 in response to a Cable Services Bureau order citing common deficiencies observed in benchmark filings generally;[11] on June 30, 1994 revising the cover sheet (Part I of the filing) to correct the June 24 revision; and on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

DISCUSSION

6. In its amended benchmark filing of February 6, 1995, Suburban calculated a maximum permitted price for the CPS tier of $11.57 per month. Suburban's actual price for the CPS tier was $11.58 per month. Thus, Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable. Moreover, we have found the following errors that require a recalculation of Suburban's maximum permitted CPS price:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Suburban has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Suburban implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Suburban's price for the period after May 14, 1994 may be required to reflect the fact that Suburban's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Suburban did not correctly account for its income tax expense. By placing entries in these columns, Suburban confirms that it is a tax-paying entity (i.e., a "C" corporation). Suburban, however, has not included the full allowance for federal income taxes applicable to the return on its investment in property, plant and equipment associated with the provision, installation, and servicing of customer premises equipment. We therefore recalculated the federal income tax allowance on the basis of a 34% corporate tax rate. Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment).[13] Application of the gross-up principle to a 34% tax rate led to an allowance for federal income taxes at .51515 of the return on investment allowed.[14] Application of the grossed-up tax provision resulted in an increase in the federal tax provision on Schedule A from the reported $2,406.68 to $6,976.42 (at Schedule A, Col. G, Total) and on Schedule C from $24,254.00 to $98,620.88 (at Schedule C, Col. G, Total). These adjustments in turn increased the monthly equipment cost unbundled by Suburban on Line 301 of Worksheet 3, Part II from $8,237.70 to $8,626.57, thereby causing a decrease in its maximum permitted charge for CPS.

b. Suburban calculated its allowable rate per channel on the basis of 18 basic service channels and 23 CPS channels. Suburban, however, provided along with its February 6 filing a channel line-up which shows 20 basic service channels and 21 CPS channels. We therefore adjusted Form 393, Part I and Form 393, Part II, Worksheet 1, Line 102B to include only 21 channels on the CPS tier.

7. Since Suburban has failed to demonstrate that its price of $11.58 for the CPS tier was not unreasonable, we will set a maximum permitted price for this tier, incorporating the adjustments discussed above. These adjustments reduce the maximum permitted CPS tier price in the community of Blue Bell from $11.57, as Suburban calculated in its Form 393 filing, to $9.98.

CONCLUSIONS

8. Upon review of the record herein and incorporating the adjustments discussed above, we conclude that Suburban's showing for the franchise area serving Blue Bell, Pennsylvania, CUID No. PA1991, supports a maximum permitted CPS tier price of $9.98 per month (plus franchise fee) for the period from October 5, 1993 to May 14, 1994.[15] We further determine that with respect to this franchise area we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that for the period after May 14, 1994, Suburban must reflect in its Form 1200 rate filing for the franchise area addressed in this Order the fact that Suburban's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Suburban's price for the period after May 14, 1994, upon completion of our review of Suburban's FCC Form 1200 rate filing.

10. We further conclude that Suburban has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Suburban of its obligation to obtain advance Commission approval of adjustments to its CPS price in the franchise serving Blue Bell, Pennsylvania, for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service price charged by Suburban Cable TV Co., Inc., in Blue Bell, Pennsylvania, CUID No. PA1991, IS GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Suburban Cable TV Co., Inc., with respect to Blue Bell, Pennsylvania, CUID No. PA1991, for the period beginning with the filing of the first valid complaint on October 5, 1993, and ending on May 14, 1994, justifies a maximum price of $9.98 per month (plus franchise fee) for its cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Suburban Cable TV Co., Inc., shall refund to subscribers in the franchise serving Blue Bell, Pennsylvania, CUID No. PA1991 that portion of the amounts paid for cable programming service for the period from October 5, 1993,[17] to May 14, 1994, that exceeded $9.98 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

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[13] *First Order on Reconsideration, Second Report and Order, Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] The income tax gross-up allowance of .51515 applied to the operator's allowed return on investment was calculated as .34/(1-.34).

[15] This finding is based solely on the representations of Suburban and the modifications described herein. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. §76.961(b).

14. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall promptly determine the overcharges to CPS subscribers in the franchise area serving Blue Bell, Pennsylvania for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Suburban Cable TV Co., Inc., shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its franchise area serving Blue Bell, Pennsylvania, CUID No. PA1991, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

16. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise area serving Blue Bell, Pennsylvania, CUID No. PA1991.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Suburban Cable TV Co., Inc., shall not be required to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Blue Bell, Pennsylvania, CUID No. PA1991, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

	CUID Nos.: CT0037 (New Milford)
	CT0038 (Bridgewater)
CCA Acquisition Corporation	CT0101 (Trumbull)
	CT0102 (Monroe)
	CT0103 (Newton)
	CT0104 (Brookfield)
	CT0105 (New Fairfield)
	CT0106 (Sherman)
	CT0169 (Bethlehem)
	CT0170 (Southbury)
	CT0171 (Woodbury)
	CT0176 (Kent)
	CT0177 (Washington)
Benchmark Filings to Support	CT0178 (Roxbury)
Cable Programming Service Prices	CT0180 (Warren)

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tiers in the communities designated above.[1] Operator has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that its CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that its prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. For each of the communities referenced in the caption, the first complete and timely complaint was served on Operator on September 7, 1993. The Commission received all of these complaints on September 3, 1993. In response to all of the complaints, Operator filed one FCC Form 393 on November 15, 1993. Operator also filed amended and supplemental Form 393 filings, most recently on May 16, 1995.[12]

5. Operator filed motions to dismiss complaints filed after September 3, 1993 for several of the communities referenced in this Order. Because we have accepted the complaints filed with the Commission on September 3, 1993 for all of the communities referenced in this Order, we find it unnecessary to rule on Operator's objections to all other later filed complaints for all of the communities referenced in this Order. On December 1, 1993, a complainant filed a reply to the Operator's motion to dismiss the complaints he filed for all of the communities referenced in this Order. However, the records of the

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[1] Crown Media, Inc. was the original operator of the cable systems referenced in this Order. The cable systems were purchased by CCA Acquisition Corporation, d/b/a Charter Communications, Inc., subsequent to the time period covered by this Order.

[2] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[12] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

Commission and of the Operator do not show that Operator ever filed such a motion.[13] Accordingly, we have no basis to rule on the complainant's reply.

6. Operator asserts that its monthly CPS tier prices are justified by its benchmark filing because its prices are less than the maximum permitted charges as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that Operator has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in its Form 393:

a. In a single FCC Form 393 filing, Operator improperly combined data for three separate areas in which it offered subscribers different CPS rates and different numbers of rate-regulated and satellite channels. According to information supplied by Operator, subscribers in CUID Nos. CT0169, CT0170, CT0171 and CT0178 received a different CPS rate and channel line-up from subscribers in CUID Nos. CT0101, CT0102, and CT0103, and from subscribers in CUID Nos. CT0037, CT0038, CT0104, CT0105, CT0106, CT0177, CT0180, and CT0176. The instructions to Form 393 clearly state that separate community units may be combined in a single filing only if "all relevant factors (including program service and equipment rates, channel line-ups and franchise fees) are identical."[14] Operator therefore should have completed and filed separate Forms 393 for each of these three areas.[15] In its amended FCC Form 393 filing of May 16, 1995, Operator provided the necessary data to calculate separately the maximum permitted price for each of the three areas covered by this Order.

b. In Lines 101 and 102, Worksheet 1, Part II of its FCC Form 393, Operator did not correctly enter its monthly tier charges and number of CPS channels as of the initial date of regulation. Although Operator submitted a list of channels for each of the three areas, these lists did not correspond with the number of channels listed for each area on its September 1, 1993 rate card. Accordingly, we adjusted Worksheet 1 to reflect the tier charges and channel information shown on the September 1, 1993 rate card as submitted by Operator.

c. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not report any income tax expense due to a net operating loss.[16] Operator is a Chapter C corporation and is therefore required to pay corporate income tax.[17] Therefore, Operator must complete Column G on the basis of its statutory tax rate, regardless of the rate it actually paid in any given year.[18] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore calculated Operator's federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate. Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on investment plus tax).[19] In accordance with this principle, we recalculated Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Operator's return on investment.

d. In Line 103, Worksheet 1, Part II of its FCC Form 393, Operator did not correctly enter its number of CPS subscribers. Accordingly, we adjusted Worksheet 1 to reflect Operator's CPS subscriber information for each of the three areas as submitted by Operator on Exhibit E, page 1 of its amended FCC Form 393 filing.

e. In Line 103, Worksheet 1, Part II of its FCC Form 393, Operator did not correctly enter its number of basic subscribers. Accordingly, we adjusted Worksheet 1 to reflect Operator's basic subscriber information for each of the three areas as submitted by Operator on page 4 of its April 27, 1995 letter.

f. In Line 33, Step G, Part III of its FCC Form 393, Operator did not adjust its annual customer equipment and installation costs to reflect the three separate areas. Accordingly, we adjusted Line 33 (and subsequent steps) in accordance with each area's percentage of subscribers as submitted by Operator on Exhibit E, page 1 of its amended FCC Form 393 filing.

7. Upon review of the record herein, and having incorporated theadjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix A (plus franchise fee) for the period from September 3, 1993 to May 14, 1994.[20]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable pro-

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[13] Letter from John McFerron, Director of Regulatory Compliance, Charter Communications Inc., to FCC (May 8, 1995).

[14] FCC Form 393, p.10 n.1.

[15] Despite requests from FCC staff, Operator has refused to file separate Forms 393. Response of Crown Cable to a Complaint Concerning Rates for Cable Programming Services Provided in Western Connecticut (March 23, 1995).

[16] Letter from John McFerron, Director of Regulatory Compliance, Charter Communications, Inc., to FCC (April 6, 1995).

[17] *Id.*

[18] *See* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 15 (released July 30, 1993).

[19] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax- paying business entities to the extent that it has a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

[20] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

gramming service prices charged by Operator in the areas referenced in the caption and at Appendix A, and all other complaints in these areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities addressed herein that portion of the amounts paid for cable programming service for the period from September 3, 1993[21] to May 14, 1994 which exceeded the maximum price for each area set forth in Appendix A (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to its CPS subscribers for the stated period, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing its plans to implement the refunds within 60 days of Commission approval of those plans.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each area set forth in Appendix A (plus franchise fee).[22]

12. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Actual Rates for CPS Tier	Maximum Permitted Rates for CPS Tier
CT0037	$12.22	$11.24
CT0038	$12.22	$11.24
CT0101	$8.36	$8.76
CT0102	$8.36	$8.76
CT0103	$8.36	$8.76
CT0104	$12.22	$11.24
CT0105	$12.22	$11.24
CT0106	$12.22	$11.24
CT0169	$15.44	$10.57
CT0170	$15.44	$10.57
CT0171	$15.44	$10.57
CT0176	$12.22	$11.24
CT0177	$12.22	$11.24
CT0178	$15.44	$10.57
CT0180	$12.22	$11.24

[21] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[22] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID No. PA2150
Township of Warrington, Pennsylvania

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in the Township of Warrington, Pennsylvania ("Warrington"), community unit identification ("CUID") number PA2150. Suburban has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Suburban's CPS tier price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint in the Warrington franchise area was completed and served on Suburban on December 27, 1993. The Commission received the complaint on January 3, 1994.

5. Suburban initially attempted to justify its CPS price through an FCC Form 393 filed on March 28, 1994. It amended its justification on June 24, 1994 in response to a Cable Services Bureau order citing common deficiencies observed in benchmark filings generally;[11] on June 30, 1994 revising the cover sheet (Part I of the filing) to correct the June 24 revision; and on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

DISCUSSION

6. In its amended benchmark filing of February 6, 1995, Suburban calculated a maximum permitted price for the CPS tier of $11.66 per month. Upon review of this amended filing, we have found no apparent errors that would require a recalculation of the maximum permitted rate. However, Suburban's actual price for the CPS tier was $11.90 per month. Thus, Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Suburban has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Suburban implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Suburban's price for the period after May 14, 1994 may be required to reflect the fact that Suburban's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

CONCLUSIONS

7. Upon review of the record herein, we conclude that Suburban's showing for the franchise area serving the Township of Warrington, Pennsylvania, CUID No. PA2150, supports a maximum permitted CPS tier price of $11.66 per month (plus franchise fee) for the period from January 3, 1994 to May 14, 1994.[13] We further determine that with respect to this franchise area we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that for the period after May 14, 1994, Suburban must reflect in its Form 1200 rate filing for the franchise area addressed in this Order the fact that Suburban's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Suburban's price for the period after May 14, 1994, upon completion of our review of Suburban's FCC Form 1200 rate filing.

9. We further conclude that Suburban has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[14] As provided in the Public Notice, we will relieve Suburban of its obligation to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving the Township of Warrington, Pennsylvania, for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by Suburban Cable TV Co., Inc., in the Township of Warrington, Pennsylvania, CUID No. PA2150, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Suburban Cable TV Co., Inc., with respect to the Township of Warrington, Pennsylvania, CUID No. PA2150, for the period beginning with the filing of the first valid complaint on January 3, 1994, and ending on May 14, 1994, justifies a maximum price of $11.66 per month (plus franchise fee) for its cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Suburban Cable TV Co., Inc., shall refund to subscribers in the franchise area serving the Township of Warrington, Pennsylvania, CUID No. PA2150, that portion of the amounts paid for cable programming service for the period from January 3, 1994,[15] to May 14, 1994, that exceeded $11.66 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall promptly determine the overcharges to CPS subscribers in the franchise area serving the Township of Warrington, Pennsylvania for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Suburban Cable TV Co., Inc., shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its franchise area serving the Township of Warrington, Pennsylvania, CUID No. PA2150, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise area serving the Township of Warrington, Pennsylvania, CUID No. PA2150.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Suburban Cable TV Co., Inc., shall not be required to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving the Township of Warrington, Pennsylvania, CUID No. PA2150, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] This finding is based solely on the representations of Suburban listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID No. PA1686
Northampton Township, Pennsylvania

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tier in Northampton Township, Pennsylvania ("Northampton"), community unit identification ("CUID") number PA1686. Suburban has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Suburban's CPS tier price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The first valid CPS complaint in the Northampton franchise area was completed and served on Suburban on November 2, 1993. The Commission received the complaint on November 8, 1993.

5. Suburban initially attempted to justify its CPS price through an FCC Form 393 filed on December 13, 1993. It amended its justification on June 24, 1994 in response to a Cable Services Bureau order citing common deficiencies observed in benchmark filings generally;[11] on June 30, 1994 revising the cover sheet (Part I of the filing) to correct the June 24 revision; and on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

DISCUSSION

6. In its amended benchmark filing of February 6, 1995, Suburban calculated a maximum permitted price for the CPS tier of $12.06 per month. However, Suburban's actual price for the CPS tier was $12.17 per month. Thus, Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, we have found the following error that requires a recalculation of Suburban's maximum permitted CPS price:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Suburban has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Suburban implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Suburban's price for the period after May 14, 1994 may be required to reflect the fact that Suburban's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Suburban did not correctly account for its income tax expense. By placing entries in these columns, Suburban confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). Suburban, however, has not included the full allowance for federal income taxes applicable to the return on its investment in property, plant and equipment associated with the provision, installation, and servicing of customer premises equipment. We therefore recalculated the federal income tax allowance on the basis of a 34% corporate tax rate. Furthermore, the Commission has stated that tax-paying businessx entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment).[13] Application of the gross-up principle to a 34% tax rate led to an allowance for federal income taxes at .51515 of the return on investment allowed.[14] Application of the grossed-up tax provision resulted in an increase in the federal tax provision on Schedule A from the reported $16,073.78 to $46.915.62 (at Schedule A, Col. G, Total) and on Schedule C from $37.548.38 to $109,599.56 (at Schedule C, Col. G, Total). These adjustments in turn increased the monthly equipment cost unbundled by Suburban on Line 301 of Worksheet 3, Part II from $18,304.36 to $20,038.40, thereby causing a decrease in its maximum permitted charge for CPS.

7. Since Suburban has failed to demonstrate that its price for the CPS tier was not unreasonable, we will set a price for this tier, incorporating the adjustment discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as to which Suburban filed.[15] On its amended Form 393, Suburban calculated the Inflation Adjustment Factor as of the end of September 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Suburban used in justifying its rates, of 1.028.

CONCLUSIONS

8. Upon review of the record herein and incorporating the adjustments discussed above, we conclude that Suburban's showing for the franchise area serving Northampton Township, Pennsylvania, CUID No. PA1686, supports a maximum permitted CPS tier price of $11.66 per month (plus franchise fee) for the period from November 8, 1993 to May 14, 1994.[16] We further determine that with respect to this franchise area we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that for the period after May 14, 1994, Suburban must reflect in its FCC Form 1200 rate filing for the franchise area addressed in this Order the fact that Suburban's price during the earlier period was unreasonable. We reserve the right to make further adjustments to Suburban's price for the period after May 14, 1994, upon completion of our review of Suburban's FCC Form 1200 rate filing.

10. We further conclude that Suburban has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Suburban of its obligation to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Northampton Township, Pennsylvania, for one-year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints against the cable programming service price charged by Suburban Cable TV Co., Inc., in Northampton Township, Pennsylvania, CUID No. PA1686, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Suburban Cable TV Co., Inc., with respect to Northampton Township, Pennsylvania, CUID No. PA1686, for the period beginning with the filing of the first valid complaint on November 8, 1993, and ending on May 14, 1994, justifies a maximum price of $11.66 per month (plus franchise fee) for its cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Suburban Cable TV Co., Inc., shall refund to subscribers in the franchise area serving Northampton Township, Pennsylvania, CUID No. PA1686 that portion of the amounts paid for cable programming service for the period from

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[13] *First Order on Reconsideration, Second Report and Order, Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also, Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] The income tax gross-up allowance of .51515 applied to the operator's allowed return on investment was calculated as .34/(1-.34).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Suburban and the modifications described herein. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark*

November 8, 1993,[18] to May 14, 1994, that exceeded $11.66 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall promptly determine the overcharges to CPS subscribers in the franchise area serving Northampton Township, Pennsylvania for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Suburban Cable TV Co., Inc., shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its franchise area serving Northampton Township, Pennsylvania, CUID No. PA1686, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

16. IT IS FURTHER ORDERED that Suburban Cable TV Co., Inc., shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order for its franchise area serving Northampton Township, Pennsylvania, CUID No. PA1686.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Suburban Cable TV Co., Inc., shall not be required to obtain advance Commission approval of adjustments to its CPS price in the franchise area serving Northampton Township, Pennsylvania, CUID No. PA1686, for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Cases, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable of New York — CUID No. NY0234 (Southern Manhattan, NY)

Benchmark Filing to Support
Cable Programming Service Price

ERRATUM

Adopted: June 5, 1995; Released: June 12, 1995

By the Chief, Cable Services Bureau:

On May 5, 1995, the Cable Services Bureau released an Order (DA 95-1003) granting complaints that had been filed with the Commission challenging the reasonableness of the cable programming service ("CPS") price charged by Time Warner Cable of New York ("Operator") in Southern Manhattan, New York.[1] The Order did not address the fact that Operator filed an amended Form 393 filing on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[2] In accordance with the *Public Notice* and pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, we find that Operator shall not be required to obtain advance Commission approval of adjustments to its CPS price in Southern Manhattan, New York for one year following the release of the May 5, 1995 benchmark order.

This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Time Warner Cable of New York, Southern Manhattan, New York, CUID No. NY0234, DA 95-1003 (Cab. Serv. Bur., released May 5, 1995).

[2] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan.20, 1995) (together, *Public Notice*).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-9

In the Matter of

Amendment of Section 73.202(b), RM-8560
Table of Allotments,
FM Broadcast Stations.
(Cambria, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1995 **Released: June 13, 1995**

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 10 FCC Rcd 869 (1995) (*"Notice"*), issued in response to a petition filed on behalf of James Kampschroer ("petitioner") proposing the allotment of Channel 278A to Cambria, California, as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. In view of the petitioner's stated interest in providing a second local FM service to Cambria, we will allot Channel 278A to that community, as requested.

3. As stated in the *Notice*, Channel 278A can be allotted to Cambria consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, without the imposition of a site restriction at coordinates North Latitude 35-33-54 and West Longitude 121-04-48.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Cambria, California, as follows:

City	Channel No.
Cambria, California	235B1, 278A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 278A at Cambria, California, will open on **July 28, 1995** and close on **August 28, 1995**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 278A at Cambria, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-129

In the Matter of

Amendment of Section 73.202(b), RM-7664
Table of Allotments,
FM Broadcast Stations.
(Lake Havasu City, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 5, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 2456 (1991), issued in response to a petition filed on behalf of Bridge Broadcasting ("petitioner"), proposing the allotment of FM Channel 244C2 to Lake Havasu City, Arizona, as that community's fourth local FM service. Petitioner filed supporting comments in response to the *Notice* reiterating its intention to apply for Channel 244C2, if allotted to Lake Havasu City.[1] London Bridge Broadcasting, Inc.[2] ("LBB"), filed opposing comments. Claire B. Benezra ("Benezra"), permittee of Station KPXC(FM), Channel 257A, Indian Springs, Nevada, filed comments and a counterproposal.[3]

[1] Although the certificate of service accompanying petitioner's comments indicates they were mailed one week prior to the initial comment deadline, they were filed with the Commission at the Secretary's Office after the deadline specified for their receipt. It is the actual filing date and not the date of service of a document that constitutes its official filing, and it is the responsibility of the party submitting comments to ensure that documents are delivered to the Commission on time. The Commission will not accept late-filed comments which contain expressions of continuing interest in an allotment proposal unless there is no opposition to the proposal and the acceptance would not have an adverse impact on another pending, acceptable proposal. Although there is opposition to the proposal by LBB and a counterproposal has been filed by Benezra, as indicated *infra*, we dispose of LBB's opposition and Benezra's counterproposal is unacceptable for consideration. Thus, our acceptance of petitioner's comments to entertain its continuing expression of interest will not prejudice any party. However, our determination here should not be interpreted as a relaxation of the Commission's Rules with respect to cut-off dates, and we advise potential parties that failure to comply with the Commission's procedural rules may result in the dismissal of a request. In fact, had Benezra's counterproposal been acceptable, we may not have entertained petitioner's late filed comments.

[2] LBB is the licensee of Stations KFWJ(AM) and KBBC(FM), Lake Havasu City, and was one of five applicants for Channel 224C2 at that community. *See* File No. BPH-920610MB. (A construction permit was subsequently issued to Steven M. Greeley for Station KJCC(FM) to operate on Channel 224C2 at Lake Havasu City. *See* File No. BPH-920610MG.)

[3] Benezra requests the substitution of Channel 257C1 for Channel 257A at Indian Springs, Nevada, and modification of the construction permit (File No. BPH-891002ML) for Station KPXC(FM) accordingly. In order to accommodate the proposal in conformity with the minimum distance separation requirements of the Commission's Rules, Benezra also requests the following substitutions and modifications: substitute Channel 259B for Channel 258B at Mountain Pass, California, and modify the license for Station KHYZ(FM); substitute Channel 244C for Channel 260C1 at Kingman, Arizona, and modify the license of Station KGMN(FM) (the license for Station KGMN(FM) has since been modified to specify operation on Channel 260C2 at Kingman; *see* File No. BLH-901120KG); substitute Channel 284C for Channel 259C at St. George, Utah, and modify the construction permit issued for Station KCLG(FM) to specify operation on Channel 284C; substitute Channel 280C3 for Channel 244A at Williams, Arizona, and modify the construction permit for Station KVTF(FM) accordingly; and substitute Channel 248B for proposed Channel 244C2 at Lake Havasu City, Arizona. (Although Lake Havasu City is located in Zone II, the transmitter site suggested for Channel 248B at Lake Havasu City is located in Zone I where the maximum FM facilities authorized are for Class B stations.)

Benezra's proposal is technically and procedurally defective and was not placed on public notice. The counterproposal did not include a certificate of service indicating service of the document on the licensees and permittees whose channel assignments would be changed by a grant of the proposal. *See* Sections 1.401(d) and 1.420 of the Commission's Rules, as well as paragraph 4 of the Appendix to the *Notice*. Moreover, although Benezra signed the counterproposal, it was not verified, nor was an address provided. Section 1.52 of the Commission's Rules requires that an original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, a pleading may be returned as unacceptable. *See Moscow, Ohio*, 5 FCC Rcd 927 (1988). Section 1.401(b) of the Rules places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification.

Additionally, Benezra's requested modification of Station KXVR(FM), Kingman, Arizona, from Channel 260C1 to nonadjacent Channel 244C, as well as the requested substitution of nonadjacent Channel 280C3 for Channel 244A at Williams, Arizona (for which a construction permit has been issued to Station KVTF(FM) (File No. BPH-900807MH)), cannot be considered as Benezra did not identify the availability of an additional equivalent channel at either community. Therefore, neither Station KXVR(FM) nor Station KVTF(FM) could have been modified as suggested, in the event competing expressions of interest were received for Channel 244C at Kingman or Channel 280C3 at Williams, Arizona. *See Fort Bragg, California*, 6 FCC Rcd 5812 (1991).

Furthermore, Benezra's requested Indian Springs, Nevada, channel upgrade would require the substitution of channels at four communities, for which a reimbursement pledge to the affected stations was given. However, the Commission will not entertain proposals which involve more than two channel substitutions at communities that are occupied by existing stations in the absence of a showing demonstrating that special factors are present that involve significant public interest benefits, or that an assurance of agreement among the affected stations to the proposal are reached in advance of the filing of the petition. *See Columbus, Nebraska*, 51 FR 4926, published February 10, 1986. The noted deficiencies are adequate grounds to reject

2. LBB acknowledges that the Commission in recent years has not considered economic competition in considering proposed amendments to the FM Table of Allotments, but argues that the allotment of an additional FM channel to a community as small as Lake Havasu City would be devastating to local radio services.[4] In this regard, LBB expressed its concern that the allotment of an additional FM service to Lake Havasu City could result in an inadequate revenue base for the provision of quality radio service by the local community outlets, and may result in a cessation of operations by others in the community. Thus, LBB urges that a general policy favoring competition should be weighed against the economic impact of allotting a new FM channel to Lake Havasu City.[5]

3. LBB also alleges that petitioner has not provided any indication it is aware of other channels which have been allotted to Lake Havasu City since its proposal was filed. LLB therefore questions the sufficiency of petitioner's expression of interest and questions whether petitioner can realistically be expected to honor its commitment to file an application for Channel 244C2 in light of the market environment in Lake Havasu City.

4. In responsive comments, petitioner disputes LBB's allegation concerning the sufficiency of its previous expressions of interest in applying for Channel 244C2 at Lake Havasu City, and reaffirms its intention to apply for a construction permit on that channel, or any other channel the Commission may allot to satisfy its stated interest in providing a new FM service to the community.

5. Based upon the information presented, we conclude that LBB's arguments are not persuasive. Contrary to LBB's claim concerning the sufficiency of petitioner's commitment to apply for and promptly construct a station on Channel 244C2 if it is allotted to Lake Havasu City, petitioner has stated and reaffirmed its intention in that regard, and LBB has not presented evidence to discredit the *bona fides* of those statements. Secondly, LBB's argument that Lake Havasu City's economy cannot support an additional local radio station does not justify denying this rule making proposal. As the Commission has previously determined, issues related to economic impact are not relevant in either a licensing or allotment context. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *aff'd*. 4 FCC Rcd 2276 (1989); *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993). *See also Albion, Nebraska*, MM Docket No. 94-143, 10 FCC Rcd 3183 (adopted March 13, 1995), 65 FR 15496, March 24, 1995. FCC Rcd 4803 (1991).[6] Consequently there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for petitioner or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of petitioner to apply for the Channel 244C2 allotment at Lake Havasu City and construct the proposed facilities.

6. In light of the foregoing, we conclude that the public interest would be served by allotting Channel 244C2 to Lake Havasu City, Arizona, as that community's fourth local FM service. As stated in the *Notice*, Channel 244C2 can be allotted to Lake Havasu City, Arizona, consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules without a site restriction.[7] Additionally, as Lake Havasu City is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government to this allotment was obtained.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lake Havasu City, Arizona	224C2,[8] 244C2, 266C3, 283C2[9]

8. The window period for filing applications on Channel 244C2 at Lake Havasu City, Arizona, will open on **July 28, 1995**, and close on **August 28, 1995**.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 244C2 at Lake Havasu City, Arizona, should be addressed to the Mass Media Bureau, Audio Services Division, FM Branch, (202) 418-2700.

Benezra's counterproposal. Therefore, it is hereby dismissed, and no responsive comments to Benezra's counterproposal will be considered.

[4] LBB advises that in addition to its Stations KBBC(FM) and KFWJ(AM), additional primary service is provided to Lake Havasu City by Station KZUL-FM, Channel 283C2. Moreover, LLB states that noncommercial educational Station KNLB(FM) also operates in Lake Havasu City. Additionally, five applications were filed for Channel 224C2, which was allotted to Lake Havasu City in MM Docket No. 88-490. *See* 7 FCC Rcd 2091 (1992).

[5] LBB also opposes the requested allotment of FM Channel 244C2 to Lake Havasu, alleging that at the time of filing, the petition constituted an untimely counterproposal in MM Docket No. 90-530. Although Channel 244B1 was identified as one of three possible alternate allotments at Baker, California, in the context of MM Docket No. 90-530, Channel 235B1 was ultimately allotted to that community. *See* 6 FCC Rcd 5785 (1991). Moreover, we note that, in any event, Channel 244B1 could have been allotted to Baker at a restricted site in conjunction with the instant proposal. Therefore, LBB's comments in this regard are moot, and we need not consider the petitioner's responsive comments related thereto.

[6] LBB's contentions in this regard are particularly perplexing, given that it filed a competing application for Channel 224C2 at Lake Havasu City. *See* footnote 2, *supra*.

[7] Coordinates used for Channel 244C2 at Lake Havasu City are 34-29-02 and 114-19-18.

[8] As indicated *supra*, Channel 224C2 was allotted to Lake Havasu City in MM Docket No. 88-490. *See* 7 FCC Rcd 2091 (1992).

[9] Channel 283C2 was substituted for Channel 286C2 at Lake Havasu City in MM Docket No. 90-468 and the license of Station KZUL-FM modified accordingly to accommodate the upgrade of Station KRDS-FM to Channel 287C1 at Wickenburg, Arizona. *See* 6 FCC Rcd 5140 (1991).

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-27

In the Matter of

Amendment of Section 73.202(b), RM-8582
Table of Allotments,
FM Broadcast Stations.
(Yazoo City, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 5, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. At the request of Mississippi College ("petitioner"), licensee of Station WHJT(FM), Channel 228A, Clinton, Mississippi, the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 2153 (1995), proposing the deletion of vacant Channel 229A at Yazoo City, Mississippi. Petitioner, Radioactivity, Inc. ("Radioactivity") and Clifton Thomas ("Thomas") filed comments. Petitioner filed reply comments.

2. Petitioner filed comments supporting the deletion of Channel 229A at Yazoo City, stating that deletion of the channel would enable Station WHJT(FM) to increase power. It contends the deletion of Channel 229A at Yazoo City will also eliminate two short-spaced allotments. Petitioner states if its proposal is adopted it will file an application to modify the license of WHJT(FM). In addition, petitioner alternatively proposed the substitution of Channel 226A for Channel 229A at Yazoo City. Petitioner notes the substitution will serve the public interest since it would permit a grant of petitioner's proposal to upgrade its facilities while accommodating any expressions of interest for the vacant Yazoo City allotment. However, petitioner states if no expression of interest is filed for Channel 229A at Yazoo City, then the Commission should delete the channel.

3. Radioactivity and Thomas filed comments opposing the deletion of the channel at Yazoo City. Both parties submit they are interested in filing an application for the vacant allotment at Yazoo City. Thomas states that Yazoo City with a population of 12,469 persons is deserving of a second local FM service.

4. We believe the public interest would be served by the substitution of Channel 226A for Channel 229A at Yazoo City, since it would permit Station WHJT(FM) to increase its power while retaining a Class A channel at Yazoo City. Channel 226A can be allotted to Yazoo City in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.4 kilometers (7.7 miles) east to avoid short-spacing conflicts with the licensed site of Station KQID(FM), Channel 226C, Alexandria, Louisiana, and to a construction permit for Station WDTL(FM), Channel 225C2, Cleveland, Mississippi.[1] We also will adopt petitioner's request to site restrict Channel 228A at Clinton, Mississippi, since it would enable Station WHJT(FM) to improve its service. Channel 226A can be allotted in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.5 kilometers (4.0 miles) northwest.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Yazoo City, Mississippi	221C3, 226A

6. The window period for filing applications will open on **July 28, 1995**, and close on **August 28, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 226A at Yazoo Cityare North Latitude 32-50-29 and West Longitude 90-16-28.
[2] The coordinates for Channel 228A at Clinton are North Latitude 32-23-55 and West Longitude 90-20-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-151

In the Matter of

Amendment of Section 73.202(b),	RM-8555
Table of Allotments,	
FM Broadcast Stations.	
(Buffalo and Lamar,	
Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 5, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 7945 (1994), proposing the substitution of Channel 260C3 for Channel 260A at Buffalo, Missouri, and the substitution of Channel 269A for Channel 260A at Lamar, Missouri. The *Notice* was issued in response to a petition filed jointly by KBFL Broadcasting Company ("KBFL"), licensee of Station KBFL(FM), Buffalo, Missouri, and KHST Broadcasting Company ("KHST"), licensee of Station KHST(FM), Lamar, Missouri. Joint comments were filed by KBFL and KHST restating their intention to apply for the respective channels, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 260C3 for Channel 260A at Buffalo, since it will provide the community with expanded service. Channel 260C3 can be allotted to Buffalo in compliance with the Commission's minimum distance separation requirements at KBFL's specified site.[2] As proposed, we will also modify the authorization for Station KBFL(FM) to specify operation on Channel 260C3 in accordance with Section 1.420(g) of the Commission's Rules. As requested, we shall also substitute Channel 269A for Channel 260A at Lamar, Missouri, and modify the license for Station KHST(FM) to specify operation on Channel 269A. Channel 269A can be allotted to Lamar at KHST's specified site in accordance with the Commission's spacing requirements.[3]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Buffalo, Missouri	260C3
Lamar, Missouri	269A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KBFL(FM), Buffalo, Missouri, IS MODIFIED to specify operation on Channel 260C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station KHST(FM), IS MODIFIED, to specify operation on Channel 269A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-920925KC except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-920925KC, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KBFL Broadcasting

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[1] In conformance with the Commission's general policy of accepting late-filed comments where the proceeding is uncontested, we will accept KBFL and KHST's comments for the purpose of permitting a continuing expression of interest in Channel 260C3 at Buffalo and Channel 269A at Lamar. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988).

[2] The coordinates for Channel 260C3 at Buffalo are 37-35-30 and 93-02-30.

[3] The coordiantes for Channel 269A at Lamar are 37-25-27 and 94-16-12.

Company, licensee of Station KBFL(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-84

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Driscoll, Gregory and Robstown, Texas)	RM-8478

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 6, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. At the request of Cotton Broadcasting ("petitioner"), licensee of Station KMIQ(FM), Channel 286A, Robstown, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3580 (1994), proposing the substitution of Channel 283C3 for Channel 286A, the reallotment of Channel 283C3 from Robstown to Driscoll, Texas, and the modification of petitioner's license to specify Driscoll as Station KMIQ(FM)'s community of license. In order to accommodate the reallotment of Channel 283C3 to Driscoll, petitioner also requested the deletion of vacant Channel 283A at Gregory, Texas. Petitioner and Reding Broadcasting Company, Inc. ("Reding") filed comments. Petitioner also filed reply comments.[1] The Commission also has before it the *Further Notice of Proposed Rule Making* (*"Further Notice"*), 10 FCC Rcd 2769 (1995), setting forth a comment period by which an expression of interest for Channel 283A at Gregory could be filed.[2] Comments in response to the *Further Notice* were filed by David Charles Solomon ("Solomon"), Gerald G. Benavides ("Benavides") and Reding.

2. As stated in the *Notice* and in the *Further Notice*, it is Commission policy not to delete a channel in which interest has been expressed. In this case, Solomon, Benavides and Reding have filed comments stating their intention to file applications for Channel 283A at Gregory, Texas. Therefore, since expressions of interest have been filed, the basis for the deletion of Channel 283 at Gregory is no longer valid.

3. IT IS ORDERED, That the petition for rule making filed by Cotton Broadcasting (RM-8478), IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner's and Reding's comments need not be addressed, given our resolution of this proceeding.

[2] In regard to the deletion of the vacant and unoccupied channel at Gregory, the *Notice* stated that the Commission would not delete a channel where an expression of interest is demonstrated by the filing of an application. However, during the pendency of this proceeding, the Commission has imposed a freeze for both new application proceedings and comparative renewal proceedings, thus interested parties were unable to file an application for the allotment at Gregory, Texas. In order to rectify this matter, the Commission issued a *Further Notice* requesting comments on the deletion of Channel 283A at Gregory, Texas.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-196

In the Matter of

Amendment of Section 73.202(b), RM-8041
Table of Allotments,
FM Broadcast Stations.
(Tallassee and Tuskegee, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 6, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 6213 (1992), issued in response to a petition filed on behalf of Tiger Broadcasting Company, Inc. ("Tiger"), proposing the reallotment of FM Channel 260A from Tuskegee to Tallassee, Alabama, and modification of the authorization of Station WACQ-FM, accordingly, pursuant to the provisions of Section 1.420(i) of the Commission's Rules.[1] Tiger filed supporting comments. WACQ submitted late-filed comments.[2]

2. Based upon the information presented in this proceeding, we believe the public interest would be served by reallotting Channel 260A from Tuskegee to Tallassee, Alabama, since it would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Tallassee (population 5,112)[3] would receive its first local FM transmission service, as well as its first fulltime aural transmission service,[4] thus triggering allotment priority (4).[5] Additionally, this action will not deprive Tuskegee (population 12,257) of local service as Station WBIL-FM, Channel 240A, as well as fulltime Station WBIL(AM) are licensed at that community. Moreover, as neither Tuskegee nor Tallassee are located within an urbanized area, the reallotment will not result in the transfer of a station from a rural to a larger urban area. Therefore, in accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station WACQ-FM to specify operation on Channel 260A at Tallassee, Alabama, in lieu of its present use at Tuskegee, Alabama.

3. As Station WACQ-FM currently places a 70 dBu signal over the entire community of Tallassee, Channel 260A can be allotted to that community at the petitioner's presently authorized site consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Coordinates used for Channel 260A at Tallassee are 32-26-30 and 85-47-45.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Tallassee, Alabama	260A
Tuskegee, Alabama	240A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WACQ, Incorporated for Station WACQ-FM, IS MODIFIED to specify operation on Channel 260A at Tallassee, Alabama, in lieu of Tuskegee, Alabama, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WACQ-FM's license (File No. BLH-921109KG) except the community, as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license (BLH-921109KG), except for the community as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

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[1] At the time this proposal was filed, Tiger was the permittee of Station WACQ-FM. A license to cover the construction permit was granted to Tiger on March 5, 1993 (File No. BLH-921109KG). Thereafter, an assignment of the license from Tiger to Tuskegee Communications Company, Incorporated ("TCC") was granted June 29, 1994 (File No. BALH-940509GF), followed by a further application for assignment of the license from TCC to WACQ, Incorporated ("WACQ"). The latter assignment application was granted on February 14, 1995 (File No. BALH-950124ED).

[2] These comments, which advise us of the recent assignment of the license of Station WACQ-FM from Tuskegee to WACQ, were not accompanied by a motion to accept. However, since the comments simply reaffirm WACQ's continuing interest in pursuing the reallotment proposal initiated by Tiger, no prejudice will result from their acceptance. WACQ also requests that it be substituted for Tiger as the proponent in this proceeding, as it fully supports the reallotment proposal initiated by Tiger. We will grant WACQ's request.

[3] Population figures are taken from the 1990 U.S. Census.

[4] Tallassee is presently served locally by Station WTLS(AM), which operates daytime only.

[5] The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, WACQ, Incorporated, licensee of Station WACQ-FM, is required to submit a rule making fee in addition to the fee required for the applications to effectuate the change in community of license.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-2

In the Matter of

Amendment of Section 73.202(b) RM-8502
Table of Allotments,
FM Broadcast Stations.
(Charlotte Amalie, Virgin Islands)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 2, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. At the request of Virgin Islands Youth Development Radio, Inc. ("petitioner"), permittee of Station WIUJ(FM), Channel 275D, Charlotte Amalie, the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 567 (1995), proposing the allotment of Channel *275A at Charlotte Amalie, Virgin Islands, and its reservation for noncommercial educational use. The petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted.[1] No other comments were received.

2. In support of its proposal, petitioner states that on March 5, 1992, Station WIUJ(FM) was granted a construction permit (BPED-910506MI) for permanent operation on Channel 275D in lieu of Channel 205D because of interference with Station WIPR-TV, Channel 6, San Juan, Puerto Rico. Station WIUJ(FM) began operating on program test authority on Channel 275D, and on March 1, 1993, filed a license application (BLED-930301KG), which is pending the resolution of the instant proceeding.[2] Although operating on Channel 275D eliminated the interference with Station WIPR-TV, Station WIUJ(FM) cannot move back on the noncommercial band without causing excessive interference with Station WIPR-TV. Therefore, petitioner contends that the allotment of Channel *275A for noncommercial use at Charlotte Amalie would allow Station WIUJ(FM) to achieve Class A status and operate without interference to Station WIPR-TV. Petitioner claims that there are no Class A channels available in the noncommercial educational band that would provide city grade coverage and also comply with the interference limitations of Section 73.525. Petitioner asserts that since Station WIPR-TV is reluctant to grant Station WIUJ(FM) an interference waiver, it can only achieve Class A status in the commercial portion of the FM band. Petitioner further claims that the allotment of Channel 275A meets all technical requirements and the reservation of the channel for noncommercial educational use would permanently reserve Station WIUJ(FM)'s existing operation and would continue to provide effective Class A service to Charlotte Amalie and the island of St. Thomas.

3. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station WIPR-TV, Channel 6, San Juan, Puerto Rico, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. An engineering analysis has confirmed that there are no Class A channels available in the noncommercial educational band that would not cause objectionable interference to Station WIPR-TV.

4. We believe the public interest would be served by allotting Channel *275A at Charlotte Amalie, Virgin Islands, and reserving it for noncommercial educational use. The allotment of Channel *275A at Charlotte Amalie would provide the community with an educational service. We note that no party has expressed an interest in the use of the channel as a commercial facility. An engineering analysis has determined that Channel *275A can be allotted to Charlotte Amalie in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.6 kilometers (6.6 miles) west.[3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Charlotte Amalie, Virgin Islands	*226A,[4] 241B1, 246B, 250B, 271B, *275A, 282B, 287B

6. The window period for filing applications will open on **July 28, 1995**, and close on **August 28, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

[1] As indicated in the *Notice*, petitioner's proposal, although signed and address provided, was not verified as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments and has complied accordingly.

[2] Also pending is an application (BMPED-930902IA) to modify Station WIUJ(FM)'s construction permit.

[3] The coordinates for Channel *275A at Charlotte Amalie are North Latitude 18-21-20 and West Longitude 65-01-45.

[4] Pursuant to a petition filed by Virgin Islands Public Television System, a *Report and Order* in MM Docket No. 95-4, RM 8501, is being concurrently adopted allotting Channel *226A at Charlotte Amalie as an noncommercial educational service.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2780.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-4

In the Matter of

Amendment of Section 73.202(b) RM-8501
Table of Allotments,
FM Broadcast Stations.
(Charlotte Amalie, Virgin Islands)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 2, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. At the request of Virgin Islands Public Television System ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 865 (1995), proposing the allotment of Channel *226A at Charlotte Amalie, Virgin Islands, and its reservation for noncommercial educational use. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. In support of its proposal, petitioner states that it has applications pending to construct public radio stations at Christiansted, St. Croix (File No. BPED-930114MB) and Charlotte Amalie, St. Thomas (File No. BPED-930114MK), both of which have been opposed by the Puerto Rico Public Broadcasting Corporation ("PRPBC").[1] Petitioner asserts that the proposed radio facilities at St. Croix and St. Thomas in the noncommercial educational band would cause potential interference to Station WIPR-TV, Channel 6, San Juan Puerto Rico. Petitioner further asserts that the potential interference can be avoided by modifying its St. Croix application, but that no modification is feasible for the St. Thomas application because of its proximity to Puerto Rico. Therefore, petitioner urges that since there are no Class A channels available in the noncommercial educational band, that Channel *226A be allotted at Charlotte Amalie and reserved for noncommercial educational use.

3. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station WIPR-TV, Channel 6, San Juan, Puerto Rico, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. An engineering analysis has confirmed that there are no Class A channels available in the noncommercial educational band that would not cause objectionable interference to Station WIPR-TV.

4. We believe the public interest would be served by the allotment of Channel *226A at Charlotte Amalie, Virgin Islands, and its reservation for noncommercial educational use. The allotment of Channel *226A at Charlotte Amalie would provide the community with an educational service. We note that no party has expressed an interest in the use of the channel as a commercial facility. An engineering analysis has determined that Channel *226A can be allotted to Charlotte Amalie in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Charlotte Amalie, Virgin Islands	*226A, 241B1, 246B, 250B, 271B, *275A,[3] 282B, 287B

6. The window period for filing applications will open on **July 28, 1995**, and close on **August 28, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

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[1] PRPBC alleges that operation of the radio stations would interfere with reception of the signal of noncommercial educational Station WIPR-TV Channel 6, San Juan, Puerto Rico, in violation of Section 73.525 of the Commission's Rules.

In addition, petitioner notes that the application for St. Thomas is mutually exclusive with the application (File No. BPED-930503MD) of Clamor Broadcasting Network, Inc., for authority to construct a new noncommercial educational station at Culebra, Puerto Rico.

[2] The coordinates for Channel 226A Charlotte Amalie are North Latitude 18-21-26 and West Longitude 64-56-50.

[3] Pursuant to a petition filed by Virgin Islands Youth Development Radio, Inc., a *Report and Order* in MM Docket No. 95-2, RM 8502, is being concurrently adopted allotting Channel *275A at Charlotte Amalie for noncommercial educational use.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-10

In the Matter of

Amendment of Section 73.202(b), RM-8572
Table of Allotments,
FM Broadcast Stations.
(Sun Valley, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 2, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. At the request of James D. Sleeman ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 871 (1995), proposing the allotment of Channel 229A to Sun Valley, Nevada, as the community's first local FM service. Petitioner and Margarita Hernandez each filed comments stating an intention to apply for the channel, if allotted. Petitioner submitted reply comments.

2. We believe the public interest would be served by allotting Channel 229A to Sun Valley since it could provide the community with its first local FM service. Channel 229A can be allotted to Sun Valley in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sun Valley, Nevada	229A

4. The window period for filing applications will open on **July 28, 1995**, and close on **August 28, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 229A at Sun Valley are 39-35-47 North Latitude and 119-46-30 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-73

In the Matter of

Amendment of Section 73.202(b), RM-8489
Table of Allotments,
FM Broadcast Stations.
(Clarksdale, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 5, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. At the request of Leroy P. Jenkins, Jr., d/b/a Delta Blues Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3158 (1994), proposing the allotment of Channel 221A to Clarksdale, Mississippi, as the community's fourth local FM service. Petitioner filed comments reiterating its intention to apply for Channel 221A, if allotted to Clarksdale. Marvell Broadcasters filed a counterproposal.[1] No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 221A to Clarksdale, since it would provide the community with an additional FM service. Channel 221A can be allotted to Clarksdale in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) west to avoid a short-spacing conflict with the presently licensed site of Station WUMS(FM), Channel 221A, University, Mississippi.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clarksdale, Mississippi	221A, 243C3, 268C3, 293C2

4. The window period for filing applications will open on **July 28, 1995**, and close on **August 28, 1995**.

5. IT IS FURTHER ORDERED, That the counterproposal filed by Marvell Broadcasters (RM-8528) IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Marvell's counterproposal was filed 2 days after the close of the initial comment period in this proceeding and therefore was deemed late-filed and unacceptable for consideration. Section 1.420(d) of the Commission's Rules states that counterproposals shall be considered only if advanced in initial comments and that they will not be considered if filed in reply comments.

[2] The coordinates for Channel 221A at Clarksdale are North Latitude 34-11-42 and West Longitude 90-37-38. At the time the *Notice* was issued, this proposal was contingent upon Station WUMS(FM) at University, Mississippi, receiving a license to operate Channel 221A at coordinates (34-24-12 and 89-24-13). Since that time the Commission granted WUMS(FM)'s application for license to cover its construction permit on November 21, 1994, thereby eliminating any conflict with this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-69

In the Matter of

Amendment of Section 73.202(b),	RM-8490
Table of Allotments,	RM-8536
FM Broadcast Stations.	
(Grenada and Crenshaw, Mississippi)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 5, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. At the request of Delta Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3152 (1994), proposing the allotment of Channel 295A to Grenada, Mississippi, as the community's second local FM service. Petitioner filed comments restating its interest in applying for Channel 295A at Grenada. Robert E. Evans, III ("Evans") filed a counterproposal.[2] Petitioner filed reply comments.

2. In his counterproposal, Evans requests the allotment of Channel 295A to Crenshaw, Mississippi, as the community's first local aural transmission service. Evans states Crenshaw has a population of 978 persons and has a Mayor/Alderman form of government. Evans submits that Crenshaw has its own water system, police staff, a 30-man volunteer fire department, elementary school, churches and approximately 25 businesses. Evans contends that according to the Commission's allotment priorities, a first local service to Crenshaw would be preferred to providing a third local service to Grenada.

3. In reply to Evans' counterproposal, petitioner argues that Evans' proposal "is merely an attempt to keep competition out of the Grenada, Mississippi market". Petitioner concedes that Evans proposal would provide the first local service for a community that currently has no broadcast outlet, but contends that very few communities of 978 inhabitants has broadcast outlets, unless they are contagious to others cities of larger populations. Petitioner submits that Crenshaw is located "in the middle of nowhere", and is not the county of the county or located on a major highway. Petitioner believes the mere fact that Crenshaw is incorporated simply does not justify the allotment of an FM channel to the community. However, petitioner states that if the Commission should determine that Crenshaw deserves a radio station, it suggests the allotment of Channel 222A to Grenada so both communities can be accommodated.

4. After consideration of the information filed in this proceeding, we believe that Crenshaw is a community for allotment purposes. Crenshaw is listed in the 1990 U.S. Census as an incorporated community with a population of 978 persons. The community is governed by an elected Mayor/Alderman form of city government and has a local school board. Municipal services are available to the community, including water, garbage and police protection. Further, a staff engineering study has confirmed that both proposals can be accommodated since an alternate channel is available to allot to the community of Grenada.

5. We believe the public interest would be served by the allotments of FM channels to Grenada and Crenshaw, since the allotments would provide an additional FM service to Grenada, and provide Crenshaw with the community's first local FM service. In order to accommodate Evans' counterproposal we shall allot Channel 222A to Grenada. Channel 222A and Channel 295A can be allotted to Grenada and Crenshaw, respectively, in compliance with the Commission's minimum distance separation requirements. Channel 222A can be allotted to Grenada with a site restriction of 4.6 kilometers (2.9 miles) north to avoid a short-spacing conflict with the licensed site of Station WQST(FM), Channel 223C3, Forest, Mississippi.[3] For Channel 295A at Crenshaw we will imposed a site restriction of 7.2 kilometers (4.4 miles) southeast to avoid a short-spacing conflict with a construction permit for Station KXFE(FM), Channel 295C3, Dumas, Arkansas.[4]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Grenada, Mississippi	222A, 261C2
Crenshaw, Mississippi	295A

7. The window period for filing applications will open on **July 28, 1995**, and close on **August 28, 1995**.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

[1] The community of Crenshaw, Mississippi, has been added to the caption.

[2] Public Notice of the counterproposal was given on October 31, 1994, Report No. 2038.

[3] The coordinates for Channel 222A at Grenada are North Latitude 33-49-02 and West Longitude 89-48-00.

[4] The coordinates for Channel 295A at Crenshaw are North Latitude 34-28-36 and West Longitude 90-07-38.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-201

In the Matter of

Amendment of Section 73.202(b)	RM-8213
Table of Allotments,	RM-8252
FM Broadcast Stations.	
(Walla Walla and Waitsburg, Washington)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 5, 1995; Released: June 13, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4468 (1993), issued in response to two conflicting petitions for rule making. Walla Walla Christian Broadcasters ("WWCB") filed a proposal requesting the allotment of Channels 256A and 270A at Walla Walla, Washington, as the community's fifth and sixth local commercial FM transmission services (RM-8213).[1] Brett E. Miller ("Miller") filed a proposal requesting the allotment of Channel 270C3 at Waitsburg, Washington, as the community's first local aural transmission service (RM-8252).[2] Miller filed comments in support of his proposal reaffirming his intention to apply for the Channel 270C3 at Waitsburg, if allotted.[3] Comments and counterproposals were filed by WWCB and KHSS, Inc. ("KHSS"), permittee of Station KHSS(FM), Channel 264C3, Walla Walla, Washington.[4] Reply comments were filed by WWCB.

2. Conflicting proposals are comparatively considered under the guidelines set forth in *Revision of FM Assignment and Policies and Procedures*, 90 FCC 2d 88 (1982).[5] However, because of the withdrawal of Miller's petition and the dismissal of the counterproposals, such a comparison is no longer necessary. Therefore, we believe the public interest would be served by allotting Channels 256A at Walla Walla, Washington, since it would provide the community with an additional local commercial FM service. An engineering analysis has determined that Channel 256A can be allotted to Walla Walla in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[6]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 28, 1995**, the FM Table of

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[1] We note that "[i]n markets with fewer than 15 stations where the less than 50 percent standard would permit ownership of three stations, an entity may not own three same service stations; pursuant to the new local rules, no more than two of those three stations may be in the same service." Accordingly, WWCB is eligible to apply for two FM channels at Walla Walla. *See Revision of Radio Rules and Policies (Memorandum Opinion and Order)*, 7 FCC Rcd 6387 (1992).

[2] On March 2, 1995, Miller filed a request for withdrawal of his proposal. Pursuant to Section 1.420(j) of the Commission's Rules, Miller states that no consideration was received in exchange for his withdrawal. Therefore, we hereby grant the withdrawal request. Accordingly, responsive pleadings to the proposal are moot and will not be discussed herein.

[3] As stated in the *Notice*, Miller's petition, although signed and an address provided, did not verify the statements contained in the petition, as required by Section 1.52 of the Commission's Rules. Miller was requested to correct the deficiency in his responsive comments, and has complied accordingly.

[4] WWCB filed a counterproposal requesting the allotment of Channel 270C2 at Waitsburg, Washington, in lieu of the proposed allotment of Channel 270A at Walla Walla, Washington. To accommodate the proposal, WWCB also requests the substitution of Channel 255C3 for Channel 269C3 at Prosser, Washington, and the modification of Station KZXR(FM)'s license accordingly. Alternatively, in the event Miller expressed no continuing interest in an allotment at Waitsburg, WWCB proposes the allotment of Channel 270C2 at Walla Walla, Washington, with the substitution of Channel 255C3 for Channel 269C3 at Prosser, Washington. In its comments, WWCB reaffirms its intention to apply for Channel 256A at Walla Walla, if allotted. In its reply comments, WWCB reiterates the requests stated in its counterproposal. Both of WWCB's counterproposals require the substitution of Channel 255C3 for Channel 269C3 at Prosser, Washington. Since the proposed substitution at Station KZXR(FM)'s presently licensed site (46-11-12 and 119-45-13) is short-spaced to Station KEZX(FM), Channel 255C, Seattle, Washington, and now to the application sites for Channel 254A, Mabton, Washington, WWCB's counterproposals are technically defective. In its counterproposal, KHSS requests the substitution of Channel 264C2 for Channel 264C3 at Walla Walla, Washington, and the modification of Station KHSS(FM)'s construction permit accordingly. We note that the counterproposal was filed subsequent to the Commission's amended Rules to permit, *inter alia*, modification of FM authorizations through a "one-step" application process. *See, FM Channel and Class Modifications by Applications*, 8 FCC Rcd 4735 (1993). Thus, since KHSS's proposal is not in conflict with any of the requests in the instant proceeding, KHSS should have submitted its proposal in the form of an application. In any event, an engineering analysis has determined that the proposed reference coordinates (45-59-04 and 118-10-08) for Channel 264C2 are short-spaced to vacant Channel 264C, Wallace, Idaho. Therefore, WWCB's counterproposal is also technically defective. Consequently, none of the counterproposals have been placed on Public Notice. Moreover, our records reveal that on February 16, 1994, KHSS filed a request for extension of time in which to built its Class C3 facility. A modification of the construction permit (File No. BMPH-940216JC) was granted on April 12, 1994 and expired on October 21, 1994. The construction permit was cancelled on December 21, 1994. There is no additional request for an extension of time pending. Therefore, because KHSS's construction permit has now been cancelled, its request for an upgrade need not be considered. Accordingly, responsive pleadings to the counterproposals will not be discussed herein.

[5] The allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given on priorities (2) and (3).]

[6] The coordinates for Channel 256A at Walla Walla are North Latitude 46-04-12 and West Longitude 118-19-48.

Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Walla Walla, Washington	227C1, 239C, 246C, 256A, 264C3

4. The window period for filing applications for Channel 256A at Walla Walla, Washington, will open on **July 28, 1995**, and close on **August 28, 1995**.

5. IT IS FURTHER ORDERED, That the petition filed by Brett E. Miller to allot Channel 270C3 at Waitsburg, Washington (RM-8252); the counterproposal filed by Walla Walla Christian Broadcasters to allot Channel 270C2 at Waitsburg, or alternatively, Channel 270C2 at Walla Walla, Washington; and the counterproposal filed by KHSS, Inc., to substitute Channel 264C2 for Channel 264C3 at Walla Walla, Washington, ARE DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telecable Associates, Inc. CUID Nos.
LA0023 (New Iberia)
LA0024 (Ruston)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1995; Released: June 14, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Telecable Associates, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[7]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[8] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[9] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[10] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[11]

3. The Commission's original rate regulations took effect on September 1, 1993.[12] The Commission subsequently revised its rate regulations effective May 15, 1994.[13] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[14] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[15] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[16]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to or lower than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[17]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[7] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[8] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[9] 47 C.F.R. § 76.956.

[10] 47 C.F.R. § 76.956(b).

[11] *Id.*

[12] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[13] 47 C.F.R. § 76.922(b).

[14] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[15] *Id.*

[16] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[17] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Prime Cities Broadcasters Corporation of Mississippi — CSR-4303-A

For Modification of Station WXXV-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1995; Released: June 14, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Prime Cities Broadcasters Corporation of Mississippi, licensee of television station WXXV ("WXXV"), Gulfport, Mississippi (FOX, channel 25), has filed the captioned petition for special relief seeking to include the Mississippi counties of Marion, Covington, Jones, Lamar, Forrest, Perry, Pearl River, Hancock, and George within the Biloxi-Gulfport-Pascagoula, Mississippi "area of dominant influence" (hereinafter "Biloxi ADI") for the limited purpose of obtaining signal carriage rights on the cable systems situated in those counties. Clear Channel Television Licensees, Inc., licensee of television station WPMI, Mobile, Alabama ("WPMI") filed an opposition to the petition to which WXXV filed a reply.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[1] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[4] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[5]

5. The Commission provided the following guidance in the *Report and Order* to aid decisionmaking in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[6]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[7] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[8]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[9] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. WXXV seeks to include the Mississippi counties of Marion, Covington, Jones, Lamar, Forrest, Perry (which are now part of the Laurel-Hattiesburg, MS ADI) Pearl River, Hancock (which are now part of the New Orleans, LA ADI), and George (which is now part of the Mobile-Pensacola, AL ADI) within the Biloxi MS, ADI. In support of its request, WXXV states the following market facts. For the six counties in the Laurel-Hattiesburg ADI, WXXV asserts that it is carried on virtually all of the cable systems "in the universe in question" and that "carriage has obtained over many years."[10] WXXV states that its signal is significantly viewed in all the counties except for Perry. The station provides a predicted Grade B contour to all of Forest and Perry Counties and parts of the other counties in question. WXXV asserts that it is the sole source of FOX network programming for a "substantial part of the universe in question" compared to the "relatively minimal, predicted over-the-air service to that universe from other FOX network stations in the general area." WXXV also states that it does not assert that no other television station provides relevant "service" to any of the counties in question and therefore, does not seek a "decisional enhancement" as the sole provider of television service to any of the counties in question. As for viewership, WXXV states that a special Nielsen study commissioned by the station shows that it had: a 9 share in Forrest County in November, 1993, the fourth highest viewing share of all the stations reported;[11] a 3 share in Jones County; and a 12 share in Perry County. WXXV argues that the other local FOX affiliates, in contrast, do not report any share in the six counties sought to be added from the Laurel ADI.

9. With regard to Pearl River and Hancock Counties, WXXV states that it is significantly viewed and is carried on the principal cable systems located in those areas. The station also states that its Grade B contour extends over all of Pearl River and Hancock. WXXV then asserts that while New Orleans FOX affiliate WNOL provides programming service to those areas, that station's Grade B covers only a minor part of Pearl River County and approximately one-

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[5] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[6] 8 FCC Rcd at 2977 (emphasis in original).
[7] *Id.* and n.139.
[8] 47 C.F.R. §76.59.
[9] 8 FCC Rcd at 2981.
[10] The station provides an exhibit which shows a partial listing of area cable operators now carrying its signal.
[11] WXXV notes that Hattiesburg, one of the two largest communities in the Laurel ADI, is located in Forrest County and its signal is carried on the Hattiesburg cable system and provides the only FOX network service both over-the-air and by cable.

half of Hancock County. As for viewing data, WXXV reports a cable viewing share of 5 in Hancock County and a 2 in Pearl River County; the station add that these numbers are higher that WNOL, which has a 2 share in Hancock and a 1 share in Pearl River.

10. In George County, WXXV states that it is significantly viewed and provides a Grade A service over the entire area but does not provide any concrete information concerning carriage except noting that "it is reasonably certain that Station WXXV is carried on most if not all of the cable systems in the county and achieves relatively high viewing throughout that universe." Withregard to viewership, WXXV reports it has an 18 share in the county which is much higher compared to WPMI, the FOX affiliate based in Mobile, AL, which has a total viewing share of 2.

11. In its opposition, WPMI argues that WXXV has failed to make the necessary showing to have its market modified to include George County.[12] First, WPMI claims that WXXV has offered no evidence that it provides actual local programming to George County residents. In contrast, WPMI argues that it produces local news programming of special interest to gulf-coast viewers every day and offers a local public affairs program every Sunday morning. Second, WPMI states that WXXV has not even attempted to demonstrate historical carriage in George County and contends that, according to the *Television and Cable Factbook*, WXXV has never been carried on either of the two cable systems serving the County. In addition, WPMI argues that the grant of the petition could result in the removal of its signal from cable systems, and consequently exacerbate disruption to cable subscribers, because cable operators could choose to carry WXXV over its signal under the Commission's "duplicating network affiliate" rules.

12. In its reply, WXXV asserts that WPMI's local program demonstration, while commendable, is not superior to its own programming efforts. WXXV states, for example, that it: (1) airs three prime-time and five other weather reports geared to South Mississippi viewers; (2) produces and airs a public affairs program every week; and (3) airs public service announcements on behalf of a wide variety of organizations and interests located in the South Mississippi area. As for historical carriage, WXXV admits that it is not carried on any cable system located in George County but explains that this aberration is due to the fact that George County is located in the Mobile, Alabama, ADI and the cable operators in that County naturally would carry a local station like WPMI. With regard to WPMI's concern about being dropped if the petition were granted, WXXV states that there is no requirement that a cable system carry only one of two duplicative network signals. WXXV concludes by suggesting that because its petition was not opposed by any party beside WPMI, the George County element should be severed for separate disposition and that its petition should be granted otherwise; in the alternative, WXXV states that WPMI's petition is unavailing and that its petition should be granted to include George County as well.

ANALYSIS AND DECISION

13. We shall deny WXXV's market modification petition principally because the station has asked for entire counties to be added to its current ADI. The 1992 Cable Act authorizes the Commission to modify ADI's to eliminate or include "communities." We do not read the word "community" as it is used in Section 614(h), in its legislative history,[13] or as used in cable regulation generally to mean "county." To allow stations or cable operators to seek to include or exclude entire counties from a particular ADI without regard to the individual circumstances of the communities or franchised areas within such counties would not facilitate an evaluation of the specific modification criteria provided for in the Act and thus an identification of the specific communities within the county has generally been required.[14]

14. WXXV also has not provided sufficient evidence to justify its market modification request, and for this additional reason, its petition will accordingly be denied. The changes requested would include almost the whole of the Laurel-Hattisburg ADI, including the core communities of Laurel and Hattisburg, within the Biloxi-Gulfport market. With respect to the particular factors specified in the 1992 Cable Act, we find that WXXV has some claim to some of the requested changes (putting aside its failure to address specific communities) based on service coverage and viewing patterns. According to Arbitron, WXXV reports no less than a 3 share (Covington County) and as high as a 9 share (George, Marion, and Pearl River) in the counties under consideration.[15] While this evidence is entitled to substantial weight, it does not by itself, and in the absence of satisfactory evidence satisfying the other tests, demonstrate that a change in its market boundary is warranted.

15. With respect to the other factors, WXXV does not provide information regarding historical carriage other than a one page exhibit partially listing some cable systems which presently carry its signal. In this instance, WXXV's demonstration is misleading because there are some cable systems, not included in this list, which *do not currently* carry its signal -- a point that was brought to light by WPMI, at least in George County. With regard to coverage, WXXV does not fully place a Grade B contour over the counties of Covington, Jones, and Lamar nor does the station provide an adequate showing that its programming istargeted to cable subscribers who reside in the counties in question. Finally, the arguments presented in the pleadings demonstrate that there is at least two other FOX affiliates currently serving some of the counties WXXV asked to be included in its ADI: WPMI serves George County and WNOL serves Pearl River and Hancock County. While we do not believe that Congress intended this criterion to

[12] WPMI notes that its opposition only concerns WXXV's request to include George County.

[13] *See* H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).

[14] We recently denied a cable operator's plea to exclude a station from particular markets partly because it asked that entire counties be removed from an ADI. *See Tele-Media Corporation*, DA 94-1574 (released: January 5, 1995).

[15] *See* Arbitron's Television County Coverage for 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the areas at issue,[16] a point to which WXXV agrees, the presence of other FOX affiliates and other stations in the area considered for inclusion does not permit this factor to weigh toward grant of the request.

ORDER

16. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed August 19, 1994 by Prime Cities Broadcasters Corporation of Mississippi, IS DENIED.

17. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[16] *See* 8 FCC Rcd 8544, 8546 at para. 14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-164

In the Matter of

Amendment of Section 73.202(b), RM-8248
Table of Allotments,
FM Broadcast Stations.
(Williamstown, West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 6, 1995; Released: June 14, 1995

By the Chief, Allocations Branch:

1. At the request of James Phillips ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 4120 (1993), proposing the allotment of Channel 245A at Williamstown, West Virginia, as its first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. Opposing comments were filed by PBBC, Inc. ("PBBC"), licensee of Station WXIL-FM, Channel 236B, Parkersburg, West Virginia. Petitioner filed reply comments.

2. In its comments, PBBC states that Williamstown has a population of 2,774[1] and is located in Wood County which has a population 86,915. Williamstown is a part of the Marietta, Ohio-Parkersburg, West Virginia Metropolitan Statistical Area. Since the principal shopping area is in Vienna, West Virginia, PBBC contends that Williamstown "appears to be a 'bedroom' community." PBBC also asserts that the market is already served by least 12 radio stations, four AM and eight FM. PBBC states that the total retail sales for the entire market amount to slightly over one billion dollars. Therefore, using traditional ratios of radio revenues as a portion of retail sales, PBBC argues that the market cannot support the present complement of stations. Consequently, PBBC submits that although Williamstown may be a community for allotment purposes, it is only one community within a market that already has numerous "voices" to serve its interests and needs, as well as to share the available revenue. PBBC asserts that Williamstown is a small community that is not unique and is in a market that is remarkably homogeneous.

3. PBBC alleges that although under different circumstances, the Commission specifically noted the numerous services available to Williamstown in *Ravenswood and Williamstown, West Virginia*, 7 FCC Rcd 5116 (1992). There, the Commission found that a first local aural transmission service to Williamstown was insufficient to offset a loss of service elsewhere. Therefore, asserts PBBC, it was deemed that a first local aural transmission service to Williamstown was not sufficient to offset the cost of providing it. Moreover, PBBC recognizes that the Commission's policy has been not to consider economic impact in connection with new allotments. However, PBBC notes that the Commission has indicated the possibility of instituting a freeze on FM stations, although no specific details were given.[2] PBBC recommends that the Commission realistically appraise its public interest responsibilities and tailor its policies in furtherance of those responsibilities. Accordingly, PBBC urges that petitioner's proposal be denied.

4. In its reply comments, petitioner argues that PBBC has failed to raise any persuasive reasons to deny the proposal. Petitioner refutes PBBC's contention that "there is no identifiable need for Williamstown to have its own 'voice'." Indeed, states petitioner, Williamstown is incorporated and is a "community" for allotment purposes. Petitioner submits documentation showing that Williamstown has easily definable boundaries, a high school, police, fire and water departments, a mayor-council government, sewage plant, library and emergency service. Williamstown also has its own telephone directory, businesses, churches and organizations. Petitioner argues that these are factors the Commission has found important when deciding whether a community deserves its own local aural transmission service, citing *Princeville, Hawaii*, 67 RR 2d 644 (1990); *Evans, Georgia*, 67 RR 113 (1989); and *Fairforest, South Carolina*, 64 RR 2d 670 (1987). In this instance, petitioner claims that the facts demonstrate that Williamstown is an independent community that can support its own radio station. Furthermore, petitioner asserts that, and PBBC concedes, the Commission no longer considers economic impact issues when making new allotments, citing *Detrimental Effects of Proposed New Broadcast Stations on Existing Stations* , 3 FCC Rcd 638 (1988), *recon. denied* 4 FCC Rcd 2276 (1989). Moreover, petitioner states that PBBC's reliance on *Ravenswood, supra*, is misplaced. In *Ravenswood*, the Commission found, *inter alia*, that a change of community from Ravenswood to Williamstown would have unfairly resulted in the loss of service to over 30,000 people. The Commission did not state however, that Williamstown was undeserving of a first local aural transmission service. Thus, unlike in *Ravenswood*, here, the proposed allotment would result in no loss of service, but would instead provide Williamstown with its first local aural transmission service. Accordingly, petitioner contends that PBBC's arguments concerning the viability of a new station at Williamstown are speculative and should be disregarded.

5. PBBC's arguments regarding competitive and economic hardships of a new allotment at Wiliamstown raise issues which the Commission has already determined not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, supra; Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for James Phillips or any other party to demonstrate a "demand" or

[1] Population figures taken from the 1990 U.S. Census.
[2] PBBC cites to an article in *Broadcasting and Cable*, August 2, 1993, p. 14.

need for an allotment aside from the already stated willingness of Mr. Phillips to apply for the Channel 245A allotment at Williamstown and construct the proposed facilities.

6. After careful consideration of the information before us, we believe the public interest would be served by the allotment of Channel 245A at Williamstown, West Virginia, since it would provide the community with its first local aural transmission service. Channel 245A can be allotted to Williamstown in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.9 kilometers (4.3 miles) southwest to avoid a short-spacing to Station WRRK(FM), Channel 245B, Braddock, Pennsylvania.[3] Since Williamstown is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 31, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Williamstown, West Virginia	245A

8. The window period for filing applications will open on **July 31, 1995,** and close on **August 31, 1995.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[3] The coordinates for Channel 245A at Williamstown are North Latitude 39-22-18 and West Longitude 81-31-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-136

In the Matter of

Amendment of Section 73.202(b),	RM-8161
Table of Allotments,	RM-8309
FM Broadcast Stations.	RM-8310
(Clewiston, Fort Myers Villas, Indiantown, Jupiter, Key Colony Beach, Key Largo, Marathon, and Naples, Florida)[1]	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 5, 1995; Released: June 14, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it the petitions for reconsideration filed by Key Chain, Inc. ("Key Chain") and Amaturo Group, Ltd., WSUV, Inc., and Jupiter Broadcasting Corporation ("Joint Petitioners") of the *Report and Order*, 9 FCC Rcd 4051 (1994) essentially granting the proposal of Spanish Broadcasting System of Florida ("SBSF") to reshuffle frequencies of three Florida Keys stations. This reshuffling was intended to achieve SBSF's stated goal of eliminating "Receiver-Induced Third Order Intermodulation Interference ("RITOIE") in some automobile receivers within the vicinity of SBSF's antenna. SBSF filed an opposition to the Joint Petitioner's petition for reconsideration, and the Joint Petitioners filed a reply.

BACKGROUND

2. At the request of Spanish Broadcasting System of Florida, Inc. ("SBSF"), licensee of Station WZMQ(FM), Channel 280C2, Key Largo, Florida, the Commission issued a *Notice of Proposed Rule Making and Order to Show Cause*, 8 FCC Rcd 3886 (1993), proposing the substitution of Channel 292C2 for Channel 280C2 at Key Largo, and the modification of its license to specify operation on Channel 292C2. In order to accommodate the substitution of Channel 292C2 for Channel 280C2 at Key Largo, petitioner also requested the substitution of Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, and the modification of Station WKKB(FM)'s construction permit to specify operation on Channel 280C2; and the substitution of Channel 288A for Channel 292A at Marathon, Florida, and the modification of Station WAVK(FM)'s license to specify operation on Channel 288A.

3. In response to the *Notice*, comments were filed by SBSF, Florida Keys Electric Cooperative Association, Inc. ("FKEC") and Mary Kay Reich ("Reich"). Counterproposals were filed by Key Chain, Inc. ("Key Chain") (RM-8309); Okeechobee Broadcasters, Inc. ("OBI"), Sunshine Broadcasting, Inc. ("Sunshine")[2] and Jupiter Broadcasting Corporation ("JBC") ("Joint Petitioners") (RM-8310)[3] and Naples Broadcasting Corporation ("NBC"), licensee of Station WGUF(FM), Marco, Florida.[4] In response to the counterproposals, reply comments were filed by SBSF, Sterling Communications Corp., licensee of Station WSGL(FM), Naples, Florida ("Sterling"), Vero Beach FM Radio Partnership ("Vero Beach"), SBSF and joint petitioners.[5]

4. We issued *Orders to Show Cause* ("Order"), ordering Richard L. Silva, ("Silva"), permittee of Station WKKB(FM), Channel 288C2, Key Colony Beach, Florida, and Key Chain, licensee of Station WAVK(FM), Channel 292A, Marathon, Florida, to show cause why their respective channels should not be modified. In response to the *Order*, Silva filed no response and Key Chain filed a counterproposal. Accordingly, pursuant to Section 1.87 of the Commission's Rules, Silva was deemed to have consented to the proposed exchange of channels.

5. In their counterproposal, Joint Petitioners requested the substitution of Channel 276C1 for Channel 276C2 at Indiantown, Florida, and the modification of Station WOKC-FM to specify operation on Channel 276C1; substitution of Channel 292C3 for Channel 276C3 at Naples, Florida, and the modification of Station WSGL(FM)'s license to specify operation on Channel 292C3; substitution

[1] The communities of Clewiston, Fort Myers Villas, Indiantown, Jupiter and Naples have been added to the caption.

[2] On April 22, 1994, an assignment of license from Sunshine Broadcasting, Inc. to WSUV, Inc., was consummated for Station WSUV(FM), Channel 292A, Fort Myers Villas, Florida (BALH-930903GI). In addition the call sign was changed from WSUV to WROC. On June 1, 1994, an assignment of license from Okeechobee Broadcasters, Inc., to Amaturo Group, Ltd., was consummated for Station WOKC(FM), Channel 276C2, Indiantown, Florida (BALH-930907GI).

[3] Public Notice of the counterproposals was given on August 6, 1993, Report No. 1958.

[4] NBC withdrew its counterproposal on July 28, 1993, because its engineering information had been erroneously prepared. In accordance with Section 1.420(j) of the Commission's Rules, NBC states that it will not receive compensation or any other consideration for the withdrawal of its counterproposal.

[5] After the close of the comment period, Joint Petitioners filed a motion for leave to file out of cycle pleading and supplemental joint comments. SBSF filed a motion for extension of time, an opposition to motion for leave to file out of cycle pleading, and contingent opposition to supplemental joint comments and erratum. Gulf Communications Partnership ("Gulf") filed a motion for leave to file comments and comments. Joint Petitioners and WSUV, Inc. ("WSUV"), successor-in-interest to Sunshine filed a request for additional time to file comments, joint opposition to motion for leave to file comments and a joint reply to opposition. Gulf filed a response to joint petitioners' opposition. WSUV filed a notice of continued interest and intent to participate. Amaturo Group, Ltd. ("Amaturo"), successor-in-interest to OBI filed a notice of continued interest and intent to participate. Commission Rule 1.415(d) precludes the filing of comments after the close of reply comment period. In addition, Joint Petitioners' counterproposal is procedurally defective due to failure to state a willingness to reimburse the licensee of Station WSGL(FM), Naples Florida. *See* para. 4.

of Channel 275C2 for Channel 292A at Fort Myers Villas, Florida, and the modification of Station WSUV(FM)'s license to specify operation on Channel 275C2; substitution of Channel 258A for Channel 292A at Clewiston, Florida, and the modification of Station WAFC-FM's license to specify operation on Channel 258A; and the substitution of Channel 292C3 for Channel 258A at Jupiter, Florida, and the modification of Station WADY(FM)'s construction permit to specify operation on Channel 292C3. Three of the five affected stations were proponents of this counterproposal and Glades Media Company ("Glades"), licensee of Station WAFC-FM, Clewiston, Florida, a fourth station provided its signed consent to the change. Joint petitioners stated their intentions to reimburse Glades for its reasonable expenses involved in changing frequencies and transmitter location. However, Joint Petitioners failed to make a reimbursement commitment in the counterproposal to Sterling Communications Corp., licensee of Station WSGL(FM), Naples, Florida, who would have had to change channels, and would have been entitled to reimbursement for the reasonable costs in changing frequencies. Accordingly, the counterproposal was dismissed as technically and procedurally deficient.

6. In response to the *Order to Show Cause* Key Chain filed a counterproposal requesting the substitution of Channel 288C2 for Channel 292A at Marathon, Florida. Key Chain contended that the increased facilities would permit Key Chain to provide an enhanced level of service to the widely-dispersed chain of islands making up the Florida Keys. This proposal was mutually exclusive with the proposed substitution of Channel 288A for Channel 292A at Marathon, Florida. The substitution of Channel 288C2 at Marathon was feasible without affecting the other changes proposed in the *Notice*. Key Chain stated its intent to apply for Channel 288C2, if allotted. No other expressions of interest were received for Channel 288C2 at Marathon.

7. After consideration of the information filed in this proceeding, we believed the public interest would be served by the substitution of Channel 280C2 for Channel 288C2 at Key Colony Beach, Florida, the substitution of Channel 292C2 for Channel 280C2 at Key Largo, Florida, and the substitution of Channel 288C2 for Channel 292A at Marathon, Florida. In accordance with Section 1.420(g) of the Commission's Rules, we modified the license of Station WZMQ(FM) at Key Largo, Florida to specify operation on Channel 292C2; we modified the construction permit for Station WKKB(FM) at Key Colony Beach, Florida, to specify operation on Channel 280C2, and we also modified the license for Station WAVK(FM) at Marathon, Florida, to specify operation on Channel 288C2. Merits

8. Key Chain contends that the Commission erred in ruling that SBSF did not have to reimburse Key Chain for any costs incurred in changing WAVK's channel because WAVK would obtain an upgrade in the process. In denying any reimbursement to Key Chain, the Commission stated:

> SBSF has stated its willingness to reimburse the licensee of Station WAVK(FM), Marathon, Florida, and the permittee of Station WKKB(FM), Key Colony Beach, Florida, for the reasonable cost associated with the change in channels. However, since the licensee of Station WAVK(FM) at Marathon sought and will receive an upgrade, no reimbursement for expenses will be required for the channel change at Marathon.

A licensee forced to change its channel is entitled to compensation from the party that benefits from the change. *Circleville, Ohio*, 8 FCC 2d 159 (1967). However, if the displaced party requests and receives a class upgrade, it is only entitled to reimbursement for the reasonable costs incurred in changing to an equivalent class channel, not for expenses incurred in the class upgrade. *Lonoke, Arkansas and Clarksdale, Mississippi*, 6 FCC Rcd 4861 (1991); *Mitchell, South Dakota*, 38 RR 2d 1688 (1976). The categories of reimbursable expenses are set forth in *Circleville, supra*, and the exact amount of such reimbursement is generally left to the good faith negotiation of the parties. *Othello, East Wenatchee & Cashmere, WA, and Wallace Idaho*, 6 FCC Rcd 6476 (1991). Accordingly, we agree that Key Chain is entitled to reasonable reimbursement for the equivalent costs of shifting WAVK to another Class A channel, but not for any expenses involved in the upgrade to a different class.

9. The Joint Petitioners first contend that their Joint Counterproposal was incorrectly dismissed on an inapplicable procedural technicality.[6] As discussed, *supra*, the Commission dismissed the Joint Counterproposal because Joint Petitioners failed to make a reimbursement commitment in their counterproposal to Sterling Communications Corp, licensee of Station WSGL(FM), Naples, Florida. In dismissing this counterproposal, the Commission relied on precedent that requires counterproposals to be technically and procedurally correct at the time they are filed. *Fort Bragg, California*, 6 FCC Rcd 5817 (1991) and *Report and Order, Broken Arrow and Bixley, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989). The Joint Petitioners contend that this authority is inherently ambiguous and failed to provide them with adequate notice of what was required of them. They further contend that even if such authority is not ambiguous, it was unfair to dismiss their counterproposals since the omission was unintentional, relatively minor and quickly corrected. We reject these assertions and believe that the Joint Petitioners had sufficient notice that their counterproposals had to be technically and procedurally correct when filed. The reimbursement pledge is a fundamental component of any counterproposal and must be present or the counterproposal is deficient and must be dismissed. Accordingly, we reject the assertions of the Joint Petitioners and affirm our dismissal of the Joint Petition-

[6] SBSF, in its Opposition to the Petition for Reconsideration, asserts that the Joint Petitioners failed to file their petition within 30 days of the public notice of the *Report and Order* and that the petition should therefore be dismissed. Specifically, SBSF asserts that Section 1.4(b)(3) of the Commission's Rules should be used to determine the date of public notice for purposes of computing the filing deadline for a petition for reconsideration. Under SBSF's interpretation, the *Report and Order* went on public notice on August 16, 1994, the date of its release by the Commission. We disagree with this interpretation and conclude that the appropriate guidelines are contained in Section 1.4(b)(1) of the Commission's Rules. *See Prineville and Sisters, Oregon*, 8 FCC Rcd 4471 (1993), *recon. pending*, 57 Fed. Reg. 57066 (Dec. 2, 1992). Under the guidelines set forth in this section, the *Report and Order* went on public notice on August 22, 1994, the date of the Federal Register summary. Accordingly, using August 22 as the starting date for computation, the petition for reconsideration had to be filed on or before September 21, 1994. Since it was filed on September 21, 1994, it was timely filed.

ers' counterproposals. *See Lonoke, Arkansas and Clarksdale, Mississippi*, 6 FCC Rcd 4861 (1991), *York, Alabama*, 4 FCC Rcd 6923 (1989), and *Circleville, Ohio*, 8 FCC 2d 159 (1967).

10. Furthermore, we find that there was an alternative technical basis that was an independent ground for dismissing the Joint Petitioners' counterproposal. Specifically, we find that the permissible area near Sanibel Island in which a transmitter site could be located ("reference site area"), while fully spaced and capable of providing a city-grade signal to the proposed communityof license, is unsuitable due to its location in an environmentally sensitive region. The reference site area is comprised almost totally of Sanibel Island, home to many endangered species including bald eagles, which borders a National Wildlife Refuge. Furthermore, the record in this proceeding demonstrates that environmental and zoning restrictions would preclude the construction of the necessary broadcast tower on Sanibel Island. Moreover, the record in another proceeding, *Sanibel Island*, 7 FCC Rcd 850 (1992) attests to the unsuitability of Sanibel Island, which was cited as impossible to use for construction of a broadcast station because of environmental concerns. As to the tiny remaining area within the reference site area, the Joint Petitioners introduce a reference site at Punta Rassa within the Sanibel reference site area, which they insist could serve as location of a suitable site. As SBSF shows, the reference site itself lies in the water, and the closest land area is on the shoreline within a public park area. We have consistently rejected any proposed reference sites that fall within bodies of water. Accordingly, this finding warranted dismissal of the Joint Commenters' counterproposal independently of the reimbursement issue.

11. Joint Petitioners also contend that based on the evidence submitted concerning alleged intermodulation interference and the presence of alternative solutions, the record did not warrant a modification of the table of allotments. Joint Petitioners further contend that SBSF made various misrepresentations of material fact in their submissions to the Commission. These assertions fail to allege any specific, reversible error that the Commission made in finding: (1) that a legitimate technical/interference problem existed; (2) that amending the table of allotments was an appropriate remedy given the evidence presented; or (3) that the evidence presented by SBSF was sufficiently credible and accurate to warrant the relief sought by SBSF. On the contrary, we are persuaded by SBSF's Opposition (and the engineering exhibit attached thereto), that an alleged instance of misrepresentation involving a proposed loss area, was actually an inadvertent typographical error causing the attribution of a loss area to the wrong station. Likewise, we do not believe there was any intent to deceive regarding the permissible site area for the Fort Myers Villa upgrade as SBSF's engineering exhibit in its Reply Comments to Counterproposal disclosed this information. Accordingly, we reject Joint Petitioners' assertions concerning the sufficiency or credibility of the evidence.

12. Accordingly, pursuant to delegated authority, IT IS ORDERED that the petition for reconsideration filed by Key Chain is GRANTED and that the petition for reconsideration filed by Joint Petitioners is DENIED.

13. For further information concerning this proceeding, contact Robert B. Somers, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-59

In the Matter of

Amendment of Section 73.202(b),	RM-7923
Table of Allotments,	RM-8042
FM Broadcast Stations	
(Bradenton and High Point, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1995; Released: June 14, 1995

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration filed by ECI License Company, L.P., of our decision to substitute Channel 278C for Channel 277C1 at Bradenton, Florida, and to modify the license of Station WDUV(FM) to specify operation on the new channel. *See Report and Order* in MM Docket No. 92-59, 8 FCC Rcd 2576 (MMB 1993).[1] The licensee of WDUV(FM), Sunshine State Broadcasting Company, Inc., filed an opposition to ECI's petition, and ECI filed a reply to that opposition.

2. ECI argues that there is no location within the fully-spaced site zone for Channel 278C at Bradenton at which Sunshine would be permitted by the Federal Aviation Administration (FAA) to build a tower sufficiently high to meet the minimum spacing and coverage requirements for a Class C station. ECI contends that the *Report and Order* failed to address the merits of its aeronautical study, and that such failure was inconsistent with Commission precedent that allotments be based on a reasonable assurance that a suitable site is available that complies with the Commission's minimum separation requirements.[2] ECI notes that although the Commission will typically presume at the allotment stage that a theoretically usable site is available, it will take into account a showing that "'in reality, no theoretical site[s] exist[ ] because of environmental, air hazard, or other similar considerations.'"[3] ECI argues that such is the case here in light of FAA restrictions and submits a preliminary FAA determination that the proposed construction would exceed FAA standards and would be an air safety hazard. ECI further contends that Sunshine relies on events that have not yet taken place, such as the projected closing of nearby MacDill Air Force Base.[4]

3. Sunshine contends that ECI raises no new arguments that were not already resolved in the *Report and Order*. Sunshine asserts that it submitted an aeronautical study to rebut ECI's study and disputes ECI's arguments with respect to the theoretical availability of a suitable transmitter site. Sunshine does not point to a specific site that would be suitable, but contends that ECI fails to account for changes in the local airspace as well as the projected closing of MacDill Air Force Base.[5] Further, Sunshine challenges the *bona fides* of ECI in seeking out the preliminary FAA finding.[6]

4. In reply, ECI contends that the changes relied upon by Sunshine have not occurred, will not occur or do not have the effect claimed by Sunshine.[7] Further, ECI asserts that while the applicant is not required to establish that a site is available, it must establish that a site is suitable for tower construction.[8]

5. ECI raises no new issues or arguments that were not addressed previously in this proceeding. We continue to believe, as we stated in the *Report and Order*, that issues concerning FAA permissible site zoning problems are more appropriately addressed at the application stage where a specific transmitter site is before the Commission and the FAA. As we noted in *West Palm Beach, supra,* note 3, and asacknowledged by ECI, if it has been shown that a site exists that satisfies the Commission's technical rules, we will generally presume that the site is theoretically available at the allotment stage. A challenger may rebut that presumption by showing that no theoretical sites exist. We do not believe that ECI has met that burden. ECI and Sunshine submitted contradicting technical studies with respect to the feasibility of situating a Class C FM tower in the Bradenton area and, at this juncture, ECI has not shown that its study is superior.

6. We note that in its reply comments, ECI points out that our 1993 order establishing a one-step procedure for FM facility upgrades requires an applicant to demonstrate that the allotment reference site would be suitable for tower construction.[9] ECI contends that the Commission's statement that these requirements "merely follow our established practice" shows that the burden is on the applicant to show suitability. ECI fails to recognize, however, that the Commission's full statement was, "[o]ur actions herein do not expand the use of contour protection in any way, but merely follow our established practice."[10] That statement, which ECI cites out of context, was not intended as a reinterpretation of the presumption explained in *West Palm Beach*. While a one-step allotment/application process necessarily requires that the applicant make a suitability showing at the allotment stage, the two-step process carries no

[1] At the time of the *Report and Order* in this proceeding, the licensee entity for ECI's stations was Entertainment Communications, Inc. (Entercom). Since that time, Entercom's licenses have been assigned to ECI, of which Entercom is the sole general partner.
[2] ECI Petition at 1-4.
[3] *Id.* at 5 (quoting *Memorandum Opinion and Order* in MM Docket No. 87-438, 6 FCC Rcd 6975, 6976 (MMB 1991) (*West Palm Beach*)).
[4] *Id.* at 8.
[5] Sunshine Opposition at 1-5.
[6] *Id.* at 7.
[7] ECI Reply at 2-3, 5-7.
[8] *Id.* at 3-4.
[9] ECI Reply at 3-4 (citing *Report and Order* in MM Docket No. 92-59 (*FM One-Step Applications*), 8 FCC Rcd 4735, 4737 n.19 (1993)).
[10] *Id.* at 4737.

such requirement. Rather, the burden is on the challenger to show that no theoretical sites exist in the relevant geographic area.

7. In light of the foregoing, IT IS ORDERED that the Petition for Reconsideration filed by ECI License Company, L.P. of the *Report and Order* in MM Docket No. 92-59 IS DENIED.

8. For further information concerning this proceeding, contact Jane Hinckley Halprin, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-550

In the Matter of

Amendment of Section 73.202(b), RM-7345
Table of Allotments,
FM Broadcast Stations
(Lafayette, Louisiana)

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 14, 1995

By the Chief, Policy and Rules Division:

I. INTRODUCTION

1. Before the Commission is a petition for reconsideration filed by C.R. Crisler challenging our decision to allow Lafayette FM Joint Venture ("LFMJV"), the permittee of Station KRRQ(FM) in Lafayette, Louisiana, to upgrade its station by substituting Channel 238C2 for Channel 238A. For the reasons set forth below, we deny Crisler's petition.

II. BACKGROUND

2. It is helpful to provide background not only for the instant proceeding but also to summarize briefly two collateral proceedings involving the same FM station. As we shall see, Crisler's petition raises issues related to these collateral proceedings.

3. We first begin with the licensing proceeding -- MM Docket No. 87-449 -- that led to the grant of the construction permit for FM Channel 238A in Lafayette to LFMJV. Crisler was one of seventeen parties who filed an application for this channel. After these applications were designated for a comparative hearing, Crisler failed to pay the required hearing fee, instead filing a request for a waiver of this fee. Crisler's waiver request was denied, however, and his application was dismissed. The administrative law judge subsequently approved a settlement agreement among the remaining applicants and awarded the construction permit to LFMJV, the entity composed of the settling parties. *AC Broadcasting, Inc.*, FCC 88M-1567 (May 24, 1988). Meanwhile, Crisler filed a multitude of pleadings seeking to overturn these actions. In a detailed opinion, the Commission recently rejected these pleadings as being both untimely filed and substantively meritless. *Memorandum Opinion and Order* in MM Docket No. 87-449, FCC 95-50 (adopted Feb. 28, 1995; released March 22, 1995) ("*Licensing Order*").

4. Before the applications in the licensing proceeding were designated for a hearing (and before Crisler's application was dismissed), Crisler initiated another proceeding -- MM Docket No. 87-267 -- to substitute higher class Channel 238C2 for Channel 238A for Lafayette while the applications for the lower class channel were pending. The Commission sought comment on this proposal, including whether upgrading the channel required the opening of a new filing window. Crisler himself at first supported an upgrade without the opening of another window, but subsequently argued the opposite after his application was dismissed. Without addressing whether a new filing window would be required, the Commission denied Crisler's petition, finding that upgrading an allotment when applications for the original allotment are pending would unduly complicate their processing and delay service to the public. *Memorandum Opinion and Order* in MM Docket No. 87-196, 4 FCC Rcd 5073 (1989), *aff'd sub nom. Crisler v. FCC*, 919 F.2d 182 (D.C. Cir. 1990) (table). The Commission did note that, with LFMJV having by this time been granted a construction permit in the licensing proceeding, it could now seek a co-channel upgrade to Channel 238C2 pursuant to Section 1.420(g) of the Rules. *Id.* at 5074-75 n.9 & 13; 47 C.F.R. § 1.420(g).

5. This, in fact, is what LFMJV did, which brings us to the instant proceeding. LFMJV initiated this proceeding by filing a petition for rule making requesting the substitution of Channel 238C2 for Channel 238A and the modification of its construction permit to specify operations on the higher class channel. The Commission issued a *Notice a Proposed Rule Making* in MM Docket No. 90-550, 5 FCC Rcd 6954 (1990) ("*NPRM*"), seeking comment on this proposal. Crisler filed the only opposing comments, arguing that his pleadings in the collateral proceedings prevented the Commission from taking action on LFMJV's upgrade proposal. Acting under delegated authority, the Chief of the Allocations Branch rejected Crisler's arguments and granted LFMJV's upgrade proposal, finding that it would serve the public interest because it would enable LFMJV to expand the coverage area of its FM service. *Report and Order* in MM Docket No. 90-550, 7 FCC Rcd 6255 (1992).

6. Crisler has filed a petition for reconsideration of this upgrade decision. LFMJV filed an opposition to the petition, to which Crisler filed reply comments.

III. DISCUSSION

7. In his reply comments, Crisler states that he has "no objection here to the community of Lafayette, Louisiana having a class C1 allotment." Crisler Reply Comments at 2. Indeed, Crisler concedes that "[i]t is in the public interest for Lafayette to have an upgraded channel." *Id.* at 2 n.1. What Crisler does object to is the fact that LFMJV is the permittee of this channel. Crisler claims that "it is not in the public interest for [LFMJV] to be the permittee or have its permit modified." *Id.* Crisler asserts a number of vague and speculative arguments that the licensing proceeding was tainted "by abuse of process and error", and seeks to have the Commission revoke LFMJV's permit and open a new filing window for the Lafayette channel. *Id.* at 6.

8. We reject Crisler's attempt to inject these collateral issues into this proceeding. In seeking an upgrade of its channel, LFMJV invoked Section 1.420(g) of the Rules which provides for the "modification of licenses or permits to mutually exclusive higher class . . . co-channels where technically feasible." *FM License Upgrading*, 60 RR2d 114, 118-19 (1986). Crisler has not raised any technical objections to LFMJV's upgrade proposal; to the contrary, as noted above, he *supports* the upgrade of the channel. Rather, Crisler, in seeking to rehash issues from collateral proceedings, in effect is asking the Commission to entertain

competing expressions of interest for the Lafayette higher class channel. But the Commission has clearly stated that it will not accept competing proposals in the context of Section 1.420(g) upgrades. *See id.* at 119. *See also NPRM*, 5 FCC Rcd 6954. Crisler had full opportunity in the licensing proceeding to raise his objections concerning the treatment of his application and the award of the Lafayette channel. *See Licensing Order* at ¶ 15. We will not allow him to resuscitate these collateral issues here. *See Equal Access Rate Elements*, 5 FCC Rcd 2573, 2574 (1990) (rejecting argument as impermissible collateral attack).

9. Crisler also argues in his petition for reconsideration that the Commission should have withheld action on LFMJV's upgrade proposal until the Commission had taken final action on his pleadings in the licensing proceeding. We disagree. To be sure, we granted LFMJV's upgrade proposal before the Commission took action in MM Docket No. 87-449 on Crisler's efforts to overturn the denial of his fee waiver request, the dismissal of his application for the Lafayette channel, and the grant of LFMJV's construction permit. But it would have served no public interest purpose to have waited for the Commission to dispose of these pleadings. As set forth in the *Licensing Order*, these pleadings were procedurally defective in that they were filed out of time. Withholding action on LFMJV's upgrade proposal would have unfairly penalized LFMJV, which had "reasonably relied on the apparent finality" of the dismissal of Crisler's application and the grant of its construction permit, and "would [have] further impede[d] inauguration of long-delayed new service to Lafayette." *Licensing Order* at ¶ 10. Withholding action would have been especially inappropriate given that Crisler himself had no objection to the upgrade of the Lafayette channel. In any event, the point is now moot, for the Commission has recently taken action on Crisler's pleadings in MM Docket 87-449, rejecting each of them in the *Licensing Order*.

10. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303 and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED that the aforementioned Petition for Reconsideration filed by C.R. Crisler IS DENIED.

11. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-81

In the Matter of

Amendment of Section 73.202(b), RM-8649
Table of Allotments,
FM Broadcast Stations.
(Temecula, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 5, 1995; Released: June 14, 1995

Comment Date: August 7, 1995
Reply Comment Date: August 22, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of BEXT, Inc. ("petitioner") requesting the allotment of Channel 277A to Temecula, California, as that community's second local FM service. Petitioner stated its intention to apply for Channel 277A if it is allotted to Temecula.

2. Based upon the petitioner's expression of interest in providing an additional local FM service to Temecula, we will propose to allot Channel 277A to that community, as requested.

3. Channel 277A can be allotted to Temecula in conformity with the minimum distance separation requirements of Sections 73.207(b)(1) and (3) of the Commission's Rules, without a site restriction, at coordinates 33-29-37 and 117-08-51. Additionally, as Temecula is located within 320 kilometers (199 miles) of the United States-Mexico border, the Commission must obtain the concurrence of the Mexican government in the proposal.

4. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Temecula, California, as follows:

	Channel No.	
City	Present	Proposed
Temecula, California	233A	233A, 277A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 7, 1995**, and reply comments on or before **August 22, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Bruce A. Eisen, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W.
Suite 1100
Washington, DC 20005-2327

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-138

In the Matter of

Amendment of Section 73.202(b), RM-8542
Table of Allotments,
FM Broadcast Stations.
(Ketchikan, Alaska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1995; Released: June 14, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 7171 (1994), issued in response to a petition for rule making filed on behalf of TLP Communications, Inc. ("petitioner") proposing the allotment of Channel 260A to Ketchikan, Alaska, as that community's third local FM service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. In view of the petitioner's stated interest in providing a third local FM service to Ketchikan, we will allot Channel 260A to that community, as requested.

3. As stated in the *Notice*, Channel 260A can be allotted to Ketchikan in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules without a site restriction at coordinates North Latitude 55-20-30 and West Longitude 131-38-48. As Ketchikan is located within 320 kilometers (199 miles) of the United States-Canadian border, the Commission obtained the concurrence of the Canadian government in the proposed allotment of Channel 260A to that community.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 31, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Ketchikan, Alaska, as follows:

City	Channel No.
Ketchikan, Alaska	260A, 290C3, 294A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 260A at Ketchikan, Alaska, will open on **July 31, 1995** and close on **August 31, 1995**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 260A at Ketchikan, Alaska, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GLOBAFON OF AMERICA, INC. — File No. I-T-C-93-343

Application for authority to resell international voice services between the United States and overseas points.

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 31, 1995; Released: June 14, 1995

By the Chief, Telecommunications Division:

1. We are considering an application filed by Globafon of America, Inc. (Globafon) pursuant to Section 214 of the Communications Act of 1934, as amended, requesting authority, inter alia, to provide international switched services by the resale of the switched voice services set forth in MCI's Tariff FCC No. 1. The application was placed on public notice and AT&T filed a Petition to Deny the application. Globafon opposed the petition, and AT&T responded.

2. AT&T petitioned to deny Globafon's application because Globafon's parent corporation, International Telecommunications Services, Inc.(ITS) is a Canadian telecommunications company, and Globafon has not demonstrated that Canada offers U.S. telecommunications companies opportunities to compete comparable to those in the United States. In particular, AT&T points to Globafon's request to route U.S.-originated calls to Canada and thereafter use Teleglobe to terminate the calls in various countries. AT&T states that no similar opportunities exist for carriers in Canada to route Canadian-originated traffic via routes through the United States.

3. In response, Globafon states that: (1) both Globafon and its parent, ITS, are not foreign-owned carriers because their shareholders are U.S. citizens; (2) Globafon amended its application to state that it will no longer be routing calls through Canada, but will provide service between the United States and other countries by reselling the switched voice services of MCI; and (3) current Commission policies favor unrestricted resale of international switched services.

4. Because Globafon no longer proposes to route calls via Teleglobe's Canadian facilities, we do not need to address AT&T's arguments that Canada does not offer comparable opportunities to route Canadian-originated calls through the United States. However, we do address the arguments raised regarding Globafon's status as an affiliate of a foreign carrier and its entry into the U.S. market for resale services. First, although Globafon is owned by U.S. citizens, its common ownership with a carrier in Canada does make Globafon a carrier affiliated with a foreign carrier, as defined in Section 63.01(r) of the Commission's Rules. However, the Commission has had a long-standing open entry policy for applicants affiliated with foreign carriers, such as Globafon, that seek authority for resale of international switched services. In *International Services*, the Commission found that open entry for switched service resale increases competition, without resulting in substantial potential for competitive harm.[1] Although the Commission recently issued a Notice of Proposed Rulemaking that comprehensively examines all of the Commission's policies regarding U.S. market entry by foreign-affiliated carriers, the Commission has not proposed to change its open entry policy for such carriers seeking to provide resale of switched services.[2] Therefore, we find that grant of Globafon's application would be consistent with Commission policy. We note, however, that grant of Globafon's application will be subject to any modifications to the Commission's open entry policy that might be adopted in the pending rulemaking proceeding.

5. In light of the above, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched resale service to the general public by Globafon.

6. Accordingly, IT IS ORDERED that application File No. I-T-C-93-343 IS GRANTED, and Globafon is authorized to provide international switched services by the resale of the international switched voice services set forth in MCI's Tariff No. 1, between the United States and the overseas points listed in that tariff.

7. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

11. IT IS FURTHER ORDERED that the Petition to Deny filed by AT&T is hereby DENIED.

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[1] *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331, 7335 (1992) (*International Services*).

[2] *See Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 95-22, 10 FCC Rcd 4844 (1995).

12. IT IS FURTHER ORDERED the authority granted herein is subject to any action the Commission may take in its Notice of Proposed Rulemaking, IB Docket No. 95-22.

13. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIRECT NET TELECOMMUNICATIONS, A LIMITED LIABILITY COMPANY — File No. I-T-C-95-132

Application for authority to acquire and operate facilities for service to various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 31, 1995; Released: June 14, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-132 IS GRANTED, and Direct Net Communications, a Limited Liability Company (Direct Net) is authorized to:

a. acquire on an IRU basis and operate three E-1 circuits in the CANUS-1 Cable System between the United States and Canada;

b. acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate three E-1 circuits in the CANTAT-III Cable System between Canada and Denmark;

c. lease and operate any necessary domestic connecting facilities;

d. lease a one-half interest and operate any necessary connecting facilities between Denmark and Sweden; and

e. use said facilities to provide, in conjunction with its correspondent in Sweden, Direct Net's regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that our authorization of Direct Net to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and one of the countries listed in the Appendix – that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendix or which originate in one of the countries listed in the Appendix and terminate in the United States. In addition, Direct Net may not – and Direct Net's tariff must state that its customers may not – connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Direct Net nor any persons or companies directly or indirectly controlling or controlled by Direct Net, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Direct Net or any persons or companies controlling or controlled by Direct Net are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7 IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act of 1934, as amended, before adding any circuits or channels of communication for the provision of service over the CANUS-1 cable system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

APPENDIX

Armenia
Austria
Azerbaijan
Belgium
Bosnia-Herzegovenia
Bulgaria
Croatia
Czech Republic
Denmark
Estonia
Finland
France
Georgia
Germany
Greece
Hungary
Iceland
Ireland
Italy
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luxembourg
Macedonia, FYRO
Malta
Moldova
Netherlands
Norway
Poland
Portugal
Romania
Russia
San Marino
Serbia & Montenegro
Slovakia
Slovenia
Spain
Sweden
Switzerland
Tajikistan
Turkey
Turkmenistan
Ukraine
United Kingdom
Uzbekistan

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 14, 1995

BPS TELEPHONE COMPANY FILE PETITION FOR WAIVER OF SECTION 69.605(C) OF THE COMMISSION'S RULES
AAD 95-67

On April 25, 1995, BPS Telephone Company ("BPS") filed a petition for waiver of the Commission's rule that precludes companies from converting from cost study settlements to average schedule settlements. See generally 47 C.F.R. § 69.605(c). BPS requests a waiver to permit it to become an average schedule company after it acquires three telephone exchanges from GTE.

Interested parties may file comments on this petition on or before **July 13, 1995**, and reply comments on or before **July 28, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should also reference AAD 95-67. Four (4) copies of each comment and reply comment should also be sent to Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for the purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Potomac Edison Co. File No. 708226
Moorefield, West Virginia

Application for a waiver of the Rules to allow less than the required four remote stations for each master station in a Multiple Address System(MAS).

ORDER

Adopted: June 2, 1995; Released: June 15, 1995

By the Associate Bureau Chief, Office of Operations-Gettysburg, Wireless Telecommunications Bureau:

1. Potomac Edison Co.(Potomac), seeks a waiver of Section 94.65(a) of the Commission's Rules, 47 C.F.R. § 94.65(a), to permit less than four remote stations for each master station in a Multiple Address System(MAS). Section 94.65(a) requires each MAS master station to serve a minimum of four separate active remote stations.

2. Potomac has requested authority to construct and operate MAS master stations at four separate locations. Each master station would communicate with a single separate remote and one shared remote. The shared remote would be located at a central location so that it can communicate with each of the four master stations.

3. In support of its request, Potomac states that a conventional MAS station with a single master station serving four remote stations is not feasible in this instance for two reasons. First, the local terrain characteristics would not allow a standard MAS station to reach the remote locations. Second, due to the close proximity of the National Radio Astronomy Observatory (NRAO), its master station would be subject to Effective Radiated Power (ERP) restrictions which would make communication with the remote stations arduous. For these reasons, Potomac argues that it must configure the system with strategically placed repeaters and directional antennas which limit the ERP in the direction of the NRAO. Potomac further states that MAS frequencies would be more spectrally efficient than using conventional point to point frequencies. Potomac states that MAS frequencies are most consistent with its bandwidth requirements. Its proposed system would use the same MAS frequency pair at all four master and remote locations. Potomac certifies, based upon frequency engineering analysis, that its proposed system will not cause harmful interference to any existing or other applied-for systems. In addition, the NRAO has reviewed Potomac's proposed system and agrees that it will not cause interference to NRAO facilities.

4. In this case, Potomac has demonstrated a unique or unusual circumstance which would justify a waiver of the Rule. Conventional MAS configuration is not feasible due to terrain characteristics and ERP restrictions imposed by the NRAO. Conventional point to point links would be spectrally inefficient based on Potomac's bandwidth requirements. The proposed system will use the same frequency pair at each of the four master stations and thus will use no more spectrum than a conventional MAS station. A grant of the proposed system would not undermine the intent of the Rule, which is to promote efficient use of the MAS spectrum. We find the operation proposed to be in the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

5. Pursuant to Section 0.331, 47 C.F.R. § 0.331, and Section 1.3, 47 C.F.R. § 1.3, of the Commission's rules, the request of Potomac Edison Co., for waiver of Section 94.65(a), of the Commission's rules, is GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Gary L. Stanford
Associate Bureau Chief
Office of Operations-Gettysburg
Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sun Cablevision, Inc. CUID Nos. HI0082 (Hawi), HI0083 (North Kohala) and HI0084 (Kapaau)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1995; Released: June 15, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to or lower than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Idaho, Inc. CUID No. ID0009 (Pocatello)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1995; Released: June 15, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

---

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

Expanded Interconnection with
Local Telephone Company Facilities

ERRATUM

Released: June 15, 1995

On July 25, 1994, the Commission released a Memorandum Opinion and Order in this proceeding, FCC 94-190. *See* 9 FCC Rcd 5154 (1994).

The last sentence in paragraph 184 of the Memorandum Opinion and Order (9 FCC Rcd at 5204) should read as follows:

> Because this problem potentially may affect only a few Tier 1 carriers with small study areas, we delegate authority to the Chief, Common Carrier Bureau, to modify the threshold point for switched transport volume and term discounts in unusual circumstances where a change in the strict requirements would advance the Commission's objectives.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Stay of Action
Pending Resolution of
Applications for Review or
Petitions for Reconsideration

Bresnan Communications	
Sault Ste. Marie,	MIDA 95-534
Cablevision/V Cable	
Brook Park, OH *et al.*	DA 95-487, DA 95-485, DA 95-484, DA 95-501, DA95-486
Comcast	
Baltimore, MD	DA 94-1153
Tallahassee, FL	DA 94-1480
Cox Cable	
Hampton Rds., VA	DA 94-1288
Ocala, FL	DA 95-661
Roanoke, VA	DA 95-678
University City, FL	DA 95- 696
Harron Communications	
Rockland, MA	DA 95-558
Harrison, MI et al.	DA 95-546
Marcy, NY *et al.*	DA 95-476
New Hartford, NY	DA 95-562
E. Whiteland, PA	DA 95-528
Kansas City Cable Partners d/b/a American Cablevision	
Kansas City, MO	DA 95-284
King Cable	
Ellensburg, WA	DA 95-341
TCI Cablevision of Greater Michigan, Inc.	
Vergennes, MI	DA 94-1632
Muskegon, MI, *et al.*	DA 95-271
Mackinaw, MI, *et al.*	DA 95-316
Fremont, MI, *et al.*	DA 95-318
Petoskey, MI, *et al.*	DA 95-814
South Haven, MI, *et al.*	DA 95-856
TCI Cablevision of West Michigan, Inc.	
Wyoming, MI, *et al.*	DA 95-819
TCI Cablevision of San Jose, CA	
Redwood City, CA, *et al.*	DA 95-656
TCI Cablevision of Northwestern Ohio, Inc.	
Archbold, OH, *et al.*	DA 95-657
TCI Cablevision of Merced County	
Merced, CA	DA 95-715
TCI of Central Florida	
Altamonte Sp. FL, *et al.*	DA 95-815
TCI of South Dade	
Kendall, FL	DA 95-818
TCI Cablevision of California, Inc.	
Redlands, CA, *et al.*	DA 95-828
Time Warner	
Champaign-Urbana, IL	DA 95-290
Queens, NY	DA 95-429
Times Mirror	
Orange County, CA	DA 94-1335
United Cable TV of East San Fernando	
Los Angeles, CA	DA 94-1286

ORDER

Adopted: June 5, 1995; Released: June 15, 1995

By the Chief, Cable Services Bureau:

1. Each of the parties noted above ("Operator" or, together, "Operators") has filed with this Bureau a motion, petition, or request for stay of the Bureau's action in ordering refunds, modification of FCC Form 1200, and reduction in current rates, pursuant to a finding by the Bureau that the Operator was charging a price for cable services programming (CPS) that was in excess of its maximum permitted rate, for the review period of September 1, 1993 to May 14, 1994. Attachment A shows each party, the citation to the relevant Bureau order, and the actual and maximum permitted rates for each during the period in question.

2. On two recent occasions, under similar circumstances, this Bureau has granted an emergency request for stay of action.[1] In each case, there was no opposition to the request. In each, we found that the Operator could suffer irreparable harm if it were required to comply with the requirements of the Bureau's refund order during the pendency of its petition for reconsideration or application for review, since it appears that expenditures made in such compliance could be unrecoverable. We also noted that any refunds and adjustments would be due from the release

[1] Newhouse Broadcasting Corp., Order, DA 95-621 (Cab. Serv. Bur., released March 28, 1995); Paragon Cable Manhattan, Order, DA 95-816 (Cab. Serv. Bur., released April 12, 1995).

date of the refund order, regardless of any stay of effectiveness, and would include interest amounts, so that no party would be harmed by such a stay. Because the equities justify granting a stay of the order's refund and rate reduction provisions, and there is no harm to subscribers or to any other party from such a stay, we found we did not need to reach the question of the likelihood of the operator's success on the merits of the issues it raises on reconsideration or application for review.

3. We find that each of the requests before us is substantially similar to the requests from Paragon Manhattan and Newhouse Broadcasting, which we granted. Although in two cases here, oppositions to the requests have been filed, we find that these oppositions are not persuasive.[2] We accordingly grant the above-noted requests for stay of action pending resolution of Operators' petitions for reconsideration or application for review.

4. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.43 of the Commission's rules, 47 C.F.R. §§ 0.321, 1.43, that the requests for stay of action pending resolution of petitions for reconsideration or applications for review filed by ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Attachment A

Request for Stay Filed by	Refund Order	date filed	opposition filed by
Bresnan Communications[3] Sault Ste. Marie, MI	DA 95-534	4/19/95	
Cablevision/ V Cable[4] Bedford Heights, OH	DA 95-485	4/14/95	
Cablevision/ V Cable Brook Park, OH *et al.*	DA 95-486	4/14/95	
Cablevision /V Cable Cleveland Heights, OH	DA 95-487	4/14/95	City of Cleveland Heights 5/1/95
Cablevision/ V Cable Euclid, OH	DA 95-484	4/14/95	
Cablevision/ V Cable Willowick, OH	DA 95-501	4/14/95	
Comcast Baltimore, MD	DA 94-1153	12/23/94	
Comcast Tallahassee, FL	DA 94-1480	1/31/95	
Cox Cable Hampton Rds., VA	DA 94-1288	1/17/95	
Cox Cable Ocala, FL	DA 95-661	5/15/95	
Cox Cable Roanoke, VA	DA 95-678	5/15/95	
Cox Cable University City, FL	DA 95-696	5/15/95	
Harron Communications Rockland, MA	DA 95-558	4/24/95	
Harron Communications Harrison, MI *et al.*	DA 95-546	4/24/95	Richmond, Memphis, Casco Twp. 5/1/95
Harron Communications Marcy, NY *et al.*	DA 95-476	4/18/95	
Harron Communications New Hartford, NY	DA 95-562	4/24/95	
Harron Communications E. Whiteland, PA	DA 95-528	4/19/95	

[2] The City of Cleveland Heights opposes Cablevision's stay request in that community, arguing on the merits that the Bureau's order is correct. The Cities of Richmond and Memphis and Casco Township ("the Cities") oppose Harron's Michigan request for stay, arguing that it was filed more than 30 days after the release date of the Bureau's order, and that Harron has failed to show that it is likely to prevail on the merits or that the economic harm of paying refunds would be irreparable. We note that Harron's pleading was timely filed, as the Commission was closed on April 21, and filings due that day were accepted on April 24. As noted above, the Cities' other arguments are not determinative here.

[3] Bresnan has filed its modified FCC Form 1200, with no rate change, and requests a stay of our requirement that it develop and file a refund plan.

[4] Bedford Heights has two CUID areas, and two relevant periods of time. Each of the Cablevision/V Cable orders is similarly structured.

Kansas City Cable Partners American Cablevision Kansas City, MO	DA 95-284	3/27/95
King Cable Ellensburg, WA	DA 95-341	3/24/95
Time Warner Champaign-Urbana, IL	DA 95-290	3/27/95
Time Warner Queens, NY	DA 95-429	4/6/95
Times Mirror Orange County, CA	DA 94-1335	12/29/94

TCI Cablevision of Greater Michigan, Inc.

Vergennes, MI	DA 94-1632	5/24/95
Muskegon, MI, *et al.*	DA 95-271	5/24/95
Mackinaw, MI, *et al.*	DA 95-316	5/24/95
Fremont, MI, *et al.*	DA 95-318	5/24/95
Petoskey, MI, *et al.*	DA 95-814	5/24/95
South Haven, MI, *et al.*	DA 95-856	5/24/95

TCI Cablevision of West Michigan, Inc.

Wyoming, MI, *et al.*	DA 95-819	5/24/95

TCI Cablevision of San Jose, CA

Redwood City, CA, *et al.*	DA 95-656	5/24/95

TCI Cablevision of Northwestern Ohio, Inc.

Archbold, OH, *et al.*	DA 95-657	5/24/95

TCI Cablevision of Merced County

Merced, CA	DA 95-715	5/24/95

TCI of Central Florida

Altamonte Sp, FL, *et al.*	DA 95-815	5/24/95

TCI of South Dade

Kendall, FL	DA 95-818	5/24/95

TCI Cablevision of California, Inc.

Redlands, CA, *et al.*	DA 95-828	5/24/95

United Cable TV of East San Fernando

Los Angeles, CA	DA 94-1286	5/24/95

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Decatur, Inc. CUID No. IL0135 (Decatur)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1995; Released: June 15, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of- service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Treasure Coast, Inc.	CUID No. FL0229 (Fort Pierce)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1995; Released: June 15, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

---

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ORBITAL COMMUNICATIONS CORP. File No. 2170-DSE-P/L-94

For a Blanket License to Construct and Operate up to 200,000 Mobile Earth Stations

ORDER AND AUTHORIZATION

Adopted: June 12, 1995; Released: June 15, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. This order completes the licensing of the first low-Earth orbiting (LEO) satellite system and heralds the commencement of non-voice, non-geostationary-based services on a worldwide basis. The technology embodied by this system promises to bring access to rapid data exchange to virtually every location and person on Earth.

2. Orbital Communications Corporation (ORBCOMM) has filed an application for a blanket license to construct and operate up to 200,000 data mobile earth terminals (METs) in conjunction with its non-voice, non-geostationary (NVNG) mobile satellite service (MSS) system.[1] In response to Public Notice, Report No. DS-1506 (February 15, 1995), STARSYS Global Positioning, Inc. (STARSYS) filed comments. For the reasons discussed below, we grant ORBCOMM's application, subject to certain conditions.

II. BACKGROUND

3. ORBCOMM, a wholly owned subsidiary of Orbital Sciences Corporation, filed its domestic application to construct a LEO MSS system using frequency bands below 1 GHz in 1990. STARSYS and Volunteers in Technical Assistance (VITA) also filed applications that appeared mutually exclusive with ORBCOMM's application.[2] In order to resolve this potential incompatibility, ORBCOMM, STARSYS, and VITA independently reached agreement on a sharing program that would permit all three to implement their systems, and leave spectrum available for future entry.[3]

4. ORBCOMM's LEO system will consist of 36 satellites, operating in four inclined and two polar orbital planes, 775 kilometers above the earth. All of the satellites are designed to operate in the 148-149.9 MHz (uplink) and 137-138 MHz (downlink) frequency bands, and will have a four-year design life. The system will be capable of processing 60,000 messages per hour in each of the inbound and outbound directions. ORBCOMM's LEO system will employ a frequency division multiple access modulation technique. In addition, the company has developed a dynamic channel activity assignment system, which scans potential uplink channels and assigns subscriber traffic to frequencies that are not currently in use by other services. ORBCOMM's first two satellites were launched on April 3, 1995. Following correction of initial technical problems, ORBCOMM reports that its satellites are functioning.[4]

III. DISCUSSION

5. *Radiation Hazard Assessment.* ORBCOMM states that the nominal output power of its METs is +7.0 dBW (EIRP), *i.e.*, 5 watts. *See* Application, Exhibit 4. The METs will normally be held out from the body with the antenna pointed upward or away from the body. ORBCOMM further states. According to ORBCOMM, the limitation on transmit power imposed by ANSI C95.1-1992[5] is 27.5 V/m at the source of the transmission. ORBCOMM calculates its METs' field strength at 24.50 V/m, even without factoring in a duty cycle. *Id.*,[6]

6. The currently applicable standard for these frequency bands under Commission Rules resides in ANSI C95.1-1982, and is 1 mW/cm2. ANSI C95.1-1982 summarily excludes devices operating at or below 5 watts. *See* 47 C.F.R. § 1.1307(b). However, in uncontrolled environ-

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[1] ORBCOMM has been authorized to construct, launch, and operate an NVNG MSS system using the 137-138 MHz and 148-149.9 MHz frequency bands, subject to conditions. *See* Order and Authorization, 9 F.C.C. Rcd 6476 (1994) (Licensing Order).

[2] STARSYS's and VITA's applications are pending before the Commission. For a more detailed summary of the applications, *see* Licensing Order, *supra*, at 6476-77.

[3] The Joint Sharing Agreement, among other matters, provides that ORBCOMM will operate throughout the upper portion of the 148-149.9 MHz band, and STARSYS will operate is spread-spectrum system in the lower portion of that band until one or the other of the systems has reached saturation levels for its allotted frequencies. *See* Licensing Order, *supra*, at 6480. The Commission, at para. 22 of the Licensing Order, stated that "ORBCOMM will be required to vacate the lower portions of the band upon written notice from STARSYS that launch of its first operational satellite will occur within 30 days." In its comments, STARSYS asserts that ORBCOMM must be held to use only frequencies above 148.905 MHz, as required by the Commission in the Licensing Order at para. 22, and that ORBCOMM's METs authorization must be conditioned on this requirement. Exhibit 8 to ORBCOMM's application states that, "Once Starsys begins operations, ORBCOMM will limit it's [sic] operations to the 148.905 MHz to 149.9 MHz frequency band subject to the joint sharing agreement dated August 7, 1992 between ORBCOMM, Starsys and VITA." We interpret ORBCOMM's Exhibit 8 as acknowledgement, acceptance, and affirmation of the requirements imposed by the Commission in the Licensing Order, which apply equally to the use of ORBCOMM's METs just as they do to its space segment.

[4] *See* Orbital Sciences Corporation News Release, 1 June 1995.

[5] IEEE C95.1-1991, IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz.

[6] Assuming 5 watts EIRP and a power density limit of 0.2 mW/cm2, the minimum permitted distance from the body is 44.6 cm.

ments the maximum permissible exposure permitted by the more recent 1992 ANSI standard is 0.2 mW/m2. Under this standard, as noted, the minimum operating distance from the human body permitted for continuous transmission by ORBCOMM's data METs is 44.6 cm. ORBCOMM claims the MET duty cycle will not exceed 1% per 15 minutes. Under these conditions, the permissible distance is substantially reduced (on the order of 1 inch) and these METs will comply with the more stringent 1992 standard. Therefore, we find that the METs are in compliance with Commission's Rules regarding radiation hazards. We note, however, that subsequent Commission action in ET Docket No. 93-62 may affect future ORBCOMM METs.[7]

IV. CONCLUSION

7. By this application, ORBCOMM seeks authorization for the user terminals of its LEO system, the first U.S. NVNG MSS system to offer personal messaging, industrial, marine, non-safety related search and rescue, and container-tracking communications services. We find, pursuant to Sections 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 309 and 319, that the public interest will be served by authorizing ORBCOMM to construct and operate up to 200,000 METs, as indicated by ORBCOMM in its application.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to Section 0.261 of the Commission's rules on delegation of authority, 47 C.F.R. § 0.261, application File No. 2170-DSE-P/L-94 IS GRANTED and ORBCOMM IS AUTHORIZED to construct and operate up to 200,000 mobile earth terminals throughout the United States, in accordance with the technical specifications set forth in its application and consistent with our rules.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[7] ET Docket No. 93-62 addresses revised standards for radiofrequency radiation emissions, including exposure guidelines for people using various kinds of radio transmitting devices.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-12

In the Matter of

Amendment of Section 73.202(b), RM-8559
Table of Allotments,
FM Broadcast Stations.
(Hudson, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1995; Released: June 16, 1995

By the Chief, Allocations Branch:

1. At the request of Phil Parr ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 955 (1995), proposing the allotment of Channel 242A to Hudson, Texas, as the community's first local aural transmission service. Petitioner filed comments reiterating his intention to apply for Channel 242A, if allotted to Hudson.[1] No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 242A to Hudson, since it would provide the community with its first local FM service. Channel 242A can be allotted to Hudson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 31, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hudson, Texas	242A

4. The window period for filing applications will open on **July 31, 1995**, and close on **August 31, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties

[1] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in his petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in his responsive comments, and has complied accordingly by a filing an affidavit.

[2] The coordinates for Channel 242A at Hudson are North Latitude 31-23-50 and West Longitude 94-46-15.

to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,

v.

INTERNATIONAL RELAY, INC., Defendant.

File No. E-87-145

ORDER

Adopted: June 7, 1995; Released: June 16, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. This proceeding was initiated as the result of a Commission order that directed Western Union Telegraph Company, now known as New Valley Corporation ("Western Union" or "New Valley"), to file a formal complaint with the Bureau's Enforcement Division. Such complaint was intended to provide, *inter alia*, a procedural forum for determining the extent to which certain interconnected carriers ("ICs") would be required to reimburse Western Union for discounts taken by the ICs on interconnected telex and TWX services.[1] Western Union thereupon filed a formal complaint on July 9, 1987, directed against defendant International Relay, Inc. ("IRI") and certain other international record carriers over amounts charged or claimed to be due arising out of telex and TWX services rendered by Western Union to the defendants.[2] On September 8, 1987, IRI filed its answer. Thereafter, at the staff's direction or encouragement,Western Union has been engaged in continuing efforts, including failed conciliation before an independent federal mediator, to reach settlements with all of the defendants over the claimed disputed amounts required to be paid with interest to it.[3]

2. On May 24, 1996, New Valley and LDDS Communications, Inc. ("LDDS"), successor in interest to IRI, filed a joint motion requesting that the complaint, insofar as it is directed against IRI, be dismissed with prejudice. In support thereof, New Valley and LDDS state that they wish to avoid continued litigation over the amounts claimed to be due from services rendered by Western Union to IRI and that they have reached a mutually agreeable settlement of this portion of their dispute. The parties advise that they have not reached a settlement with regard to the remaining defendant ICs, namely TRT Telecommunications Corporation and FTC Communications, Inc. (which, in addition to IRI, also were acquired by LDDS during the course of this proceeding), and Graphnet, Inc.

3. We are satisfied that dismissal of the complaint, insofar as it is directed against IRI, will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission in this long-protracted proceeding.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C.§ 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed by the parties in the above-captioned proceeding IS GRANTED.

5. IT IS FURTHER ORDERED that the complaint filed by The Western Union Telegraph Company on July 9, 1987, IS DISMISSED WITH PREJUDICE, insofar as it is directed against International Relay, Inc.

6. IT IS FURTHER ORDERED that the above-captioned proceeding IS TERMINATED.

7. IT IS FURTHER ORDERED that New Valley's claim for reimbursement from IRI with respect to the proceedings in CC Docket Nos. 78-97 and 82-122 shall be deemed WITHDRAWN, effective upon this order becoming final.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] In the Matter of Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 2 FCC Rcd 2999, 3002, 3008 (1987).

[2] The other defendants were RCA Global Communications, Inc., Western Union International, Inc., MCI International, Inc., TRT Telecommunications, Inc., FTC Communications, Inc., Graphnet, Inc., and Consortium Communications, Inc.

[3] The complaints against RCA Global Communications, Inc., Western Union International, Inc., MCI International, Inc., and Corsortium Communications, Inc. were dismissed following settlements reached between the parties in those proceedings. *See* The Western Union Telegraph Co. v. Consortium Communications, Inc., FCC Rcd, (Enf. Div., Com. Car. Bur. 1995), DA 95-1138 (released May 25, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-524

In the Matter of

Amendment of Section 73.202(b),	RM-7501
Table of Allotments,	RM-7631
FM Broadcast Stations.	
(Sebring and Miami, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1995; Released: June 16, 1995

By the Chief, Allocations Branch:

1. At the request of WJCM, Inc. ("WJCM"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6579 (1990), proposing the allotment of Channel 298A to Sebring, Florida, as the community's second local FM service. WWRM, Inc., ("WWRM") licensee of Station WWRM(FM), Channel 297C1, St. Petersburg, Florida, filed comments. WJCM filed comments restating its intention to apply for Channel 298A or any channel allotted to Sebring. Spanish Radio Network ("SRN"), licensee of Station WQBA(FM), Channel 298C1, Miami, Florida, filed comments and counterproposal requesting the substitution of Channel 298C for Channel 298C1 at Miami, Florida, and the modification of Station WQBA(FM)'s license to specify the higher class channel.[2] WJCM filed reply comments. In response to the counterproposal SRN and WJCM filed comments and supplemental comments. After the record closed WWRM filed a request for leave to file further reply comments and WJCM filed an opposition to WWRM's request for leave to file further reply comments.[3]

2. SRN in its counterproposal states that the allotment of Channel 298A to Sebring will limit the possibility of Station WQBA(FM) operating with full Class C status. SRN argues that WJCM's reference point is located close to the Sebring Regional Airport, which is a public use airport protected by Part 77 of the Federal Aviation Regulations. SRN contends that a Class A 6 kilowatt station is not possible on Channel 298A, because an antenna tower tall enough for a full Class A 6 kilowatt facility would intrude into protected airspace, and there would be possible radio interference to the aeronautical radio band. SRN submitted an engineering analysis which determines the distance of the proposed tower from the nearest point of the closest runway which disclosed that the site is located approximately 8,200 feet from the closest point of Runway 36. At the distance specified, the allowable height before notice to FAA would be required is 82 feet AGL - 147 feet AMSL. WJCM's assumed height of 340 feet AGL - 405 feet AMSL is within the "notice" criteria of Part 77. SRN states that WJCM's proposal would exceed Part 77.23(a)(2) by 140 feet AGL, its height in excess of 200 feet AGL less than 3 nautical miles from the Sebring Airport reference point. SRN also argues that a station cannot be built for Channel 298A at Sebring that satisfies both Section 73.207 and Section 73.315 of the Commission's Rules. Therefore, SRN opposes the allotment of Channel 298A to Sebring and requests the substitution of Channel 298C for Channel 298C1 for Station WQBA(FM), Miami, Florida.

3. WWRM in its comments argue that the proposed site for Channel 298A at Sebring does not meet mileage separation requirements, assuming full use of the Commission's rounding-off methodology. WWRM contends that the proposal is limited to one unique site which satisfies the spacing requirements of Section 73.207. This parcel lies approximately six miles to the southeast of Sebring, located within 10,000 feet of the Sebring Air Terminal and is approximately one mile from an east-west runway at the Sebring Air Terminal and is almost directly aligned with the Airport's 4/22 runway. WWRM submits that the Sebring Airport Authority owns the only parcel in which a fully spaced facility may be located. WWRM states that Sebring's petition for rule making should be dismissed, since there is no site which can satisfy both Sections 73.207 and 73.315(a) of the Commission's Rules and Sections 77.23 and 77.25 of the Federal Aviation Administration ("FAA") Rules. Sections 77.23 and 77.25 of the FAA rules limit towers to a height of 150 feet above ground level within a 10,000 foot radius of the Sebring Air Terminal's north-south, non-utility or non-visual runway. WWRM submits that if the tower for Channel 298A at Sebring is reduced to 150 feet above ground level to satisfy 14 C.F.R. Sections 77.23 and 77.25, then the proposed station would provide city grade coverage to only one-third of the city of Sebring, in violation of Section 73.315(a) of the Rules. WWRM states that WJCM must show that there is a "reasonable basis" to conclude that FAA approval of a maximum Class A facility can be obtained, citing *Blackspear, Georgia*, 2 FCC Rcd 3323 (1987). WWRM argues the fact that the site is owned by the local airport authority raises substantial doubts as to the availability of the site. WWRM also contends that under these circumstances "the Commission requires the proponent to provide an engineering study showing that the allotment can indeed be made in conformance with the technical rules." *See Creswell, Oregon*, 3 FCC Rcd 4608 (1988). In addition, the Commission's rules independently impose an affirmative obligation on the petitioner to identify at the rule making stage more than a "theoretical" site which is fully spaced. Where, as here, the allotment involves a site restriction. Section 73.208(a)(2) calls for the submission of a "showing indicating the availability of a suitable site." WWRM claims that WJCM has provided no such showing and, its proposal should be dismissed, citing *Bay Shore, New York*, 20 RR 2d 1558 (1970).

[1] The community of Miami, Florida, has been added to the caption.

[2] Public Notice of the counterproposal was given February 15, 1991, Report No. 1838, RM-7631.

[3] Although these comments were filed after the pleading cycle ended in this proceeding, we will consider them because they provide a more complete record for resolution of this proceeding. *See* Section 1.425 of the Commission's Rules.

4. In reply comments WJCM states that it has no reason to believe that the site proposed would be unavailable. Although located in the vicinity of the Sebring airport, use of the site is not precluded by its location. The north-south runway of the Sebring airport is presently inactive, and the east-west runway has been dedicated to the Sebring International Auto Race held annually. WJCM states that the opponents have produced no credible evidence that the proposed site would not be approved by the airport authority. WJCM submits a copy of a statement attesting to a conversation with the manager of the Sebring Airport, Mr. Ed Jordan. Mr. Jordan indicated no particular difficulty with an application to use the site suggested by WJCM, however, his opinion is not binding upon the FAA. WJCM states that SRN's counterproposal to upgrade Station WQBA(FM) at Miami, Florida, is not mutually exclusive with the allotment of Channel 298A to Sebring, Florida. Channel 298C can be allotted to Miami, Florida at coordinates 25-32-34 and 80-28-07, while still allotting Channel 298A to Sebring, Florida. WJCM contends that the objections raised by the opponents in this proceeding are more properly handled by the Commission upon the submission of an application. The sole exception made by the Commission has been in the case of sites specified in allotment proceedings that do not meet the spacing requirements of the rules, or will not put a city-grade signal over the principal community to be served. WJCM states that once a channel is assigned by rule making, an applicant is free to choose any transmitter site, so long as it provides city-grade coverage in accordance with Section 73.315 of the Commission's Rules. WJCM concedes that there is no other site adequately spaced other than that specified in the *Notice*, which complies with all Commission spacing and city-coverage requirements. WJCM contends that the Commission has paved the way in circumstances such as this one for use of a site short-spaced but contour-protective of other stations through use of a directional antenna, citing *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 4 FCC Rcd 1681 (1989).

5. In reply comments SRN argues that the alternate site and imposition of the site restriction WJCM has proposed would substantially degrade WQBA(FM)'s coverage and therefore it cannot support WJCM's suggested resolution. SRN states that from the proposed site, station WQBA(FM) would provide a second commercial FM reception service to an area approximately 1,580 square kilometers in southeastern Collier County, Western Dade County and northern Monroe County. However, WJCM's reference site would entail an actual loss of existing service to an area with at least 1,400 square kilometers and 221,452 residents in northeastern Broward County and southern Palm Beach County. SRN states that for this reason WJCM's proposed site restriction is unacceptable. In addition, WJCM's reference site is markedly less efficient due to the larger amount of primary service extended over marine areas. SRN contends that operation at WJCM's reference site would provide service to 8.4 percent less area and 239,329 fewer persons than SRN's reference site. SRN notes that WJCM's proposed allotment of Channel 298A would provide service to at least 203,329 fewer persons than WQBA(FM)'s present Class C1 operation.

6. We have examined WWRM's engineering statement and a staff engineering analysis confirms that the proposed site in the *Notice* requested by WJCM would be technically infeasible for the allotment of Channel 298A to Sebring, Florida. The allotment of Channel 298A to Sebring at the proposed coordinates is apparently the only site available, and the tower would be located within 10,000 feet of the Airport Terminal. In addition, a staff engineering analysis confirms WWRM's engineering statement, along with the submission of an FAA report which shows that at the proposed coordinates a tower could not be built any higher than 172 feet (52 meters), above ground level, and a facility of that height with an ERP of 6 Kw would provide city grade coverage to only one-third of Sebring's community, which makes the allotment infeasible. It also appears that the local airport authority owns the only parcel of land available where a tower could be located to meet the Commission's minimum distance requirement. In an attempt to resolve the conflict we conducted a channel search to determine if there is an alternate channel available for allotment to Sebring. We find that there are no fully spaced alternate sites or channels available for Sebring that would meet FAA approval, and provide city-grade coverage to Sebring. The underlying requirement for an allotment is the reasonable expectation that a useable site is available complying with the minimum spacing requirements. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. *See San Clemente, California*, 3 FCC Rcd 6728 (1988), *appeal dismissed sub. nom. Mount Wilson FM Broadcasters, Inc. v. FCC*, 884 F 2d 1462 (D.C. Cir. 1989), also *See San Clemente, California*, 8 FCC Rcd (1993) released December 8, 1993. The actual availability of a potential transmitter site complying with the spacing requirements is a matter which can be raised in comments from all interested parties. In the event the issue is raised, then we must make a determination on the reasonable likelihood that a site will be available. We will not allot a channel where a properly spaced site is technically infeasible. Here, information has been presented which indicates that there are no satisfactory sites available that would meet FAA criteria and the Commission's spacing requirement. We do not consider land within 10,000 feet of an Airport Terminal to be an available site, as we believe it doubtful that FAA approval would be granted for a transmitter site so close to its terminal. Therefore, we will deny WJCM's petition.

7. Based on the above information, we believe the public interest would be served by substituting Channel 298C for Channel 298C1 at Miami, Florida. Channel 298C can be allotted to Miami, Florida, in compliance with the Commission's minimum distance separation requirements,[4] with a site restriction of 5.8 kilometers (3.6 miles) west, in order to avoid a short-spacing to Station WIRK(FM), Channel 300C1, West Palm Beach, Florida. As requested, we will also modify Station WQBA(FM)'s license to specify operation on Channel 298C.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 31, 1995**, the FM Table of

[4] The coordinates for Channel 298C at Miami are North Latitude 25-47-42 and West Longitude 80-14-36.

Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Miami, Florida	226C, 243C, 247C, 256C1, 268C1, 298C

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WQBA(FM), Miami, Florida, IS MODIFIED, to specify operation on Channel 298C in lieu of Channel 298C1 at Miami, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Spanish Radio Network, licensee of Station WQBA(FM) is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

11. IT IS FURTHER ORDERED, That the petition for rule making filed by WJCM, Inc. requesting the allotment of Channel 298A to Sebring, Florida (RM-7501) IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-125

In the Matter of

Amendment of Section 73.202(b),	RM-8534
Table of Allotments,	RM-8575
FM Broadcast Stations.	
(Fredericksburg, Helotes and Castroville, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1995; Released: June 16, 1995

By the Chief, Allocations Branch:

1. At the request of October Communications Group, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 6471 (1994), seeking comments on the proposed reallotment of Channel 266C from Fredericksburg to Helotes, Texas, and the modification of Station KONO-FM's license to specify Helotes as its community of license. Petitioner filed supporting comments and reply comments. In addition, petitioner submitted a contingent counterproposal proposing the reallotment of Channel 266C to Castroville, Texas.[2] No other comments were received.

2. As stated in the *Notice*, Helotes, an incorporated community with a population of 1,535 persons,[3] has its own police and fire departments, libraries, religious institutions, non-profit organizations such as 4-H, Lions, Lioness and Optimist Clubs, as well as numerous local business. Further, Channel 266C can be allotted to Helotes at Station KONO-FM's present transmitter site in compliance with the Commission's minimum distance separation requirements. We recognized that the allotment of Channel 266C would provide Helotes with its first local transmission service. However, for several reasons, we questioned whether the reallotment would result in a preferential arrangement of allotments. First, removing Channel 266C from Fredericksburg would deprive the substantially larger community of 6,934 persons, and county seat, of its sole local FM transmission service. Secondly, while neither Fredericksburg nor Helotes are located within an Urbanized Area, we noted that Helotes is within the Rand McNally San Antonio Metropolitan Area, is closer to San Antonio and is considered to be already well served with at least five aural reception services. Finally, we stated that since Station KONO-FM already provides Helotes with a 70 dBu city-grade signal and no change in transmitter site is contemplated by the petitioner, there would be no improvement in Station KONO-FM's facilities or coverage area. However, even though we were unable to reach a tentative conclusion that the proposal would result in a preferential arrangement of allotments, we issued the *Notice* to provide the petitioner with an opportunity to provide any additional information in support of its proposal.

3. In response, petitioner takes exception to the Commission's citation of the decision in *Van Wert, Ohio and Monroeville, Indiana* ("*Van Wert*")[4] as support for our concerns about the instant reallotment from Fredericksburg to Helotes. Petitioner claims that the facts in *Van Wert, supra*, are "starkly different." First, Van Wert had no nighttime transmission service except from the station seeking reallotment while Fredericksburg will still receive such service from Station KNAF(FM). Secondly, unlike Van Wert, Fredericksburg also has a television allotment. Next, petitioner states that there is no evidence in the *Van Wert* decision that the community has any "dynamic local character" while Helotes is shown to clearly be a growing, vibrant community with an "unusually wide array" of civic attributes. Finally, it states that Helotes is considerably removed from San Antonio and twice as close in population to Fredericksburg (1: 4) as Monroeville is to Van Wert (1: 8).

4. Petitioner further states that recent events have resulted in an increase in reception service to Fredericksburg. Specifically, it states that Station KFAN(FM), Channel 300C2, although licensed to Johnson City, Texas, has established its main studio in Fredericksburg and provides the community with 70 dBu service. The level of local service will also increase, according to petitioner, when TV Channel 2 goes on the air.[5] It acknowledges that Helotes has reception service from Fredericksburg Stations KONO-FM and KNAF(AM) but points out that it presently has no local transmission service. Therefore, it insists that the allotment of Channel 266C to Helotes would result in a preferential arrangement of allotments by furthering the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.[6]

5. Petitioner reiterates that Helotes is a community for allotment purposes, citing the fact that it is incorporated, is included in the 1990 U.S. Census and has various commercial enterprises and civic organizations. Petitioner also states that Helotes attracts many visitors, as the home of the Helotes Cornyval, the Optimist Club's Classy Chassis Car Show and the John Floore County Store, a country-music and dance hall which accommodates about 1,500 people. In addition, it states that Helotes has a weekly newspaper, a separate telephone directory, post office and zip code. While it acknowledges that most of Helotes' work force

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[1] The community of Castroville has been added to the caption.
[2] Public Notice of the filing of the counterproposal was given on January 18, 1995, Report No. 2052.
[3] Population figures are taken from the 1990 U.S. Census.
[4] *See* 7 FCC Rcd 6519 (1992).
[5] In considering whether to reallot an FM station, the Commission looks only at aural stations, not television stations. Therefore, while Fredericksburg may enjoy local television service some time in the future, it is not relevant to this proceeding. *See* 5 FCC Rcd 7094 at 7097 (1994).
[6] *See* 90 FCC 2d 88 (1982). The allotment priorities are as follows: (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. The provision of second aural service and first local service are treated co-equally.

commutes elsewhere, in particular to military bases, it argues that this is true of many towns which already have local transmission service.

6. Petitioner recognizes that the Commission has, where circumstances warrant, the right to flexibility in allotment proceedings. Further, it also recognizes the Commission's stated belief that the public has a legitimate expectation that existing service will continue and that this factor will be weighed independently against the service benefits which may occur from the reallocation of a channel from one community to another. In fact, petitioner contends that the residents of Helotes also have the right to expect that local service, once commenced, will continue. It states that daytime-only AM Station KXAM, on 1440 kHz, was licensed to Helotes but because of market forces hostile to AM stations, asked the Commission in 1988 to cancel its license. Therefore, petitioner contends that it seeks to "fulfill Helotes's legitimate expectation and to restore local service to the town via FM, which will ensure the transmission service's long-term viability." (footnote omitted.) In this regard, petitioner states that the reallotment of an existing station to Helotes is the only way in which the residents can resume local transmission service. The Commission no longer permits the initiation of new daytime-only AM stations like KXAM and no new full time AM or FM station can be allotted to Helotes in compliance with the Commission's licensing standards. Petitioner states that it intends to fulfill its responsibilities as a Helotes licensee by airing a weekly 30-minute public affairs program addressing the "unique" issues facing Helotes as well as a minimum of five separate public-service campaigns monthly to provide exposure of charitable and civic activities within the community.

7. Petitioner argues that the fact that Helotes is closer to San Antonio than is Fredericksburg is irrelevant. Neither community is within the San Antonio Urbanized Area and, although raised in the *Notice*, petitioner states that the Commission does not consider whether a community is located within a Rand McNally Metropolitan Area to be significant in proceedings involving the change of a station's community of license.

8. Petitioner states that while it firmly believes that the public interest would best be served by the relicensing of Station KONO-FM to Helotes, it contingently proposes that the station be relicensed to Castroville instead. It states that Castroville has many of the same attributes and need for local transmission service as Helotes. Castroville, with a population of 1,821 persons, is an incorporated community, with its own public service organizations, churches, public elementary and secondary schools as well as a parochial elementary school. It is governed by a mayor and city council, which has and exercises local taxing authority, and its own police and volunteer fire department. In addition, petitioner points out that Castroville has a municipal airport, commercial bus service, newspaper, banks, its own utility supply systems, telephone directory and chamber of commerce. Petitioner submits that a total of 541 people work in Castroville. Petitioner states that Channel 266C can be allotted to Castroville in compliance with the Commission's minimum distance separation requirements from its presently licensed transmitter site. Finally, it states that it will apply for Channel 266C whether licensed to Helotes or Castroville.

DISCUSSION

9. The proposed reallotment of Channel 266C from Fredericksburg to Helotes or Castroville was filed pursuant to the provisions of Section 1.420(i) of our Rules, which permits, in limited circumstances, the reallotment of a channel from one community to another and the modification of a station's license to reflect the new community, without competition from other applicants for the newly allotted channel. *See Modification of FM and TV Authorizations to Specify a New Community of License* ("*Modification of License R&O*"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("*Modification of License MO&O*"). Under *Modification of License R&O* and the subsequent *Modification of License MO&O*, the reallotment must serve the Commission's allotment policies and priorities as set forth in *Revision of FM Assignment Policies and Procedures, supra*. Thus, we must evaluate the comparative merits of retaining Channel 266C at Fredericksburg versus allotting the channel to either Helotes or Castroville.

10. The allotment of Channel 266C to either Helotes or Castroville would further priority (3), the provision of a first local aural service while the channel's allotment to Fredericksburg would trigger priority (4), other public interest matters, since the community already has local aural service from daytime-only Station KNAF(AM).[7] While the allotment of Channel 266C to either Helotes or Castroville could fulfill the higher priority of providing a first local transmission service, in cases such as this which involve the removal of an existing service, the Commission must also take into account the effect caused by the deletion of an existing service. As stated in *Modification of License MO&O, supra*,

> Among other factors relevant pursuant to Section 307(b), the Commission considers under these residual categories the location of the proposed allotment with respect to other communities, and the availability of other services in the communities affected by the proposed change. Under these circumstances, it is proper for the Commission to consider whether a proposal would result in shifting of service from an underserved rural to a well-served urban area and the public interest consequences of any such change. (footnote omitted)
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> Consistent with precedent, we do not intend to apply the first local service preference of our allotment criteria blindly. We recognize that an inflexible application of that preference, without further analysis, could consistently result in our finding that a reallotment leading to first local service for a suburb

[7] KNAF(AM) operates on 910 kHz with 1000 watts daytime and 174 watts nighttime. Petitioner states that the station's daytime 5 mV/m groundwave contour and nighttime interference-free contour fully encompass Fredericksburg. However, with a nighttime power of less than 250 watts nighttime, KNAF(AM) remains classified as a daytime-only station. *See Burlington, Iowa and Hamilton, Illinois*, 6 FCC Rcd 2458 (1991).

> of a much larger adjacent metropolitan center justifies removing a local service from a more remote community. We wish to dispel any concern that our new rule would lead to such a result.
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> The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another, *regardless of whether the service removed constitutes a transmission service*, a reception service, or both.

5 FCC Rcd at 7096 - 7097 (emphasis added). Thus, the public interest benefits accruing from the provision of a first local service must be significant enough to outweigh the loss of a transmission service to the original community of license.

11. In this case, we cannot find that the reallotment of Channel 266C to either Helotes or Castroville provides a public interest benefit significant enough to override the loss of Fredericksburg's sole local FM transmission service. As stated above, we will not blindly apply the first local service preference. Therefore, we have examined the three communities with respect to their relative locations, populations and reception services and find that both Helotes and Castroville are significantly smaller in population to Fredericksburg, located much closer to the San Antonio Urbanized Area and have a far greater number of reception services. Helotes and Castroville are located 1.2 kilometers (0.75 miles) and 14.8 kilometers (9.2 miles), respectively, from the San Antonio Urbanized Area while Fredericksburg is 75 kilometers (47 miles) from the Urbanized Area. Likewise, both Helotes, with a population of 1,535 persons, and Castroville, with a population of 2,159 persons, are only one-fourth to one-third as populous as Fredericksburg, with a population of 6,934 persons. Next, Helotes enjoys full-time reception service from twenty-two radio stations, Castroville receives such service from twenty radio stations while Fredericksburg, the most populous community and most distant from the San Antonio Urbanized Area receives full time aural service from only seven stations. Finally, we are told that most of Helotes work force commutes elsewhere, especially to military bases in the San Antonio area, and a total of 541 people work in Castroville. Since this figure represents the total work force in Castroville, it does not represent the number of Castroville residents who live and work in the community. No employment figures are given for Fredericksburg but as the county seat and its location considerably more distant from the Urbanized Area, we believe that it is reasonable to presume that a significant number of their residents also work in Fredericksburg.

12. Based on the characteristics of the three communities, we cannot find that the public interest would be served by depriving the residents of Fredericksburg of their sole local FM transmission service, a service which has been existence for many years. While it is unfortunate that Helotes' AM station is no longer on the air, there is nothing in the Commission's change of community or other rules which confers a right to the restoration of a previous service to such communities by the deletion of an existing service from another community. We disagree with the petitioner that the situation in this proceeding differs significantly from that present in *Van Wert, supra*. In *Van Wert, supra*, petitioner requested the reallotment of Channel 255B from Van Wert to Monroeville and the modification of Station WBYR(FM)'s license accordingly. Like the situation here, the allotment to Monroeville would have provided the community with its first local service. Monroeville is located close to but outside the Fort Wayne Urbanized Area being 27.9 kilometers (17.3 miles) from the center of the urbanized area. However, the reallotment would have deleted Van Wert's sole local FM service, its only local aural competitive voice, and its only nighttime transmission service.[8] Monroeville is also significantly smaller than Van Wert, having only approximately one-seventh the population but with substantial reception services from stations licensed to Fort Wayne and other nearby communities. Finally, as is the case here, the Van Wert petitioner requested no change in Station WBYR(FM)'s transmitter site as the station already provided Monroeville with a 70 dBu signal.[9] The Commission found:

> The provision of a first local transmission service to Monroeville, a community one-seventh the size of Van Wert, requires the loss of a local transmission service by the residents of Van Wert. [footnote omitted.] The loss of Station WBYR(FM), as a Van Wert transmission service, would remove that community's only local nighttime service as well as its sole local competitive voice. [footnote omitted.] While this disruption may be warranted if there were sufficient public interest benefits, we find that insufficient benefits are present here. There would be no improvement in the reception service already provided by the station, since petitioner has not stated an intention to move to a site different from that specified in its outstanding license. Indeed, petitioner has

[8] Both the Fredericksburg and Van Wert AM stations are authorized nighttime powers of under 250 watts. Thus, they both remain licensed as daytime-only stations.

[9] We recognize that in *Elizabeth City, North Carolina and Chesapeake, Virginia* ("*Elizabeth City*"), 9 FCC Rcd 3586 (1994), the Commission granted a request to reallot a channel and modify a station's community of license where no change in transmitter site was involved. However, the situation in this proceeding is not analogous to that in *Elizabeth City*. In *Elizabeth City*, the Commission reallotted Channel 229C from Elizabeth City to Chesapeake, as the community's third local aural transmission service, and modified Station WKOC-FM's license accordingly, even though there was no change in transmitter site. Unlike the situation here, Elizabeth City, with a substantially smaller population (14,292 persons) received local transmission service from five AM and FM stations while Chesapeake (151,976 persons) received local transmission service from only two aural stations. Thus, the removal of Station WKOC-FM's channel would still leave Elizabeth City with four local aural transmission services. Here, we would be removing Fredericksburg's sole local FM transmission service in order to provide the substantially smaller communities of either Helotes or Castroville with their first local aural transmission service.

presented no evidence suggesting that Station KBYR(FM) is unable to providePMonroeville with any specialized service at this time, as the station currently provides Monroeville with a 70 dBu city-grade signal.

See 7 FCC Rcd at 6520. Even if this case is argued to be less stark than *Van Wert*, that does not compel a contrary result.

13. Accordingly, IT IS ORDERED, That the petition for rule making submitted by October Communications Group, Inc., to reallot Channel 266C from Fredericksburg, Texas, to either Helotes (RM-8534) or Castroville (RM-8575), Texas, IS DENIED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

KERN BROADCASTING CORPORATION
Assignor

File Nos. BAL-911211EA
BALH-911211EB

and

LAGNIAPPE BROADCASTING, INC.
Assignee

For Assignment of the Licenses of
Radio Stations KGEO(AM) and
KGFM-FM, Bakersfield, CA

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 1995; **Released: June 16, 1995**

By the Commission:

1. The Commission has before it an application for review filed by Grapevine Radio, Inc. ("Grapevine") of a December 9, 1992 letter from the Chief, Audio Services Division, Mass Media Bureau ("Bureau").[1] By that action, the Bureau denied the petition to deny filed by Grapevine and granted the above-captioned application for assignment of the licenses of KGEO(AM) and KGFM-FM, Bakersfield, California, from Kern Broadcasting Corporation to Lagniappe Broadcasting, Inc. ("Lagniappe"). Opposition, reply pleadings and various supplemental pleadings and replies have been submitted. As set forth below, we affirm the Bureau's action granting the above-captioned assignment.

2. *Background.* The above-captioned application sought Commission consent to assign the KGEO(AM)\KGFM-FM licenses to Lagniappe, a corporation in which Rogers Brandon is the single majority shareholder. At the time of that application's filing, Rogers Brandon was a director, secretary and vice-president of American General Media ("AGM") which controls, through wholly-owned subsidiaries, KERN(AM/FM), Bakersfield, California. The application proposed that Rogers Brandon would resign those positions before consummation of the subject assignment.[2] Rogers Brandon's father, Lawrence Brandon, and Rogers' brother, Anthony Brandon, are the sole shareholders of AGM. Rogers, Anthony and Lawrence Brandon hold common broadcast interests in other markets.[3]

3. Grapevine alleged that a grant of the application would contravene 47 C.F.R. § 73.3555, the Commission's multiple ownership rule.[4] It further maintained that Lawrence and Anthony were undisclosed real-parties-in-interest to the subject application and if granted, the Brandon family would unlawfully control four Bakersfield radio stations. In support of its claim, Grapevine contended that evidence of the close, ongoing business ties between Rogers Brandon and other Brandon family members included: AGM's and Anthony Brandon's guarantee of Rogers Brandon's performance under a promissory note given to Kern; Anthony and Rogers' co-ownership of the studio site occupied by KERN(AM/FM); the Brandons' joint broadcast interests in other markets; and the Brandon family's operation of its stations as if equally owned by Rogers, Anthony and Lawrence Brandon.

4. In its December 9, 1992 letter denying Grapevine's objections, the Bureau, applying the two-step analysis set forth in *Astroline Communications Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988), held that assuming, *arguendo*, that Grapevine's allegations presented a *prima facie* showing that grant of the subject application would be inconsistent with the public interest, no substantial and material question of fact existed that warranted denial or designation of the application for hearing.[5] Specifically, the Bureau found that Grapevine had failed to demonstrate how the Brandon's business and family relationships established that Lawrence and Anthony are undisclosed real-parties-in-interest in Lagniappe. Relying on Commission precedent, the Bureau determined that the existence of a familial or business relationship, standing alone, is not sufficient to create a presumption of common control for purposes of determining compliance with the Commission's multiple ownership rules and related policies. The Bureau held that AGM and Anthony Brandon's guarantee of Lagniappe's promissory note and Anthony and Rogers Brandon's arm's-length co-ownership of the KERN(AM/FM) studio site did not indicate *de facto* control of Lagniappe by the Brandon family. The Bureau also noted that Lawrence and Anthony Brandon supplied af-

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[1] Grapevine is the licensee of station KKXX(FM), Delano, California, located in the Bakersfield market.

[2] Documents subsequently filed with the Commission indicate that Rogers Brandon's resignation as an officer and director in AGM and its subsidiaries became effective on December 31, 1992, the consummation date of the above-captioned assignment.

[3] Rogers and Anthony Brandon co-own American General Media of Texas, Inc. ("AGM-Texas"), which controls KKCL-FM, Lorenzo, Texas; KZOZ-FM, San Luis Obispo, California; KKAL(AM), Arroyo Grande, California; WYDE(AM), Birmingham, Alabama; and KWFS-FM Wichita Falls, Texas. Lawrence Brandon is an AGM-Texas director.

[4] At the time of the subject application's filing, Section 73.3555 (a) prohibited the common ownership of AM stations with overlapping 5 mV/m contours or common ownership of FM stations with overlapping predicted 3.16 mV/m contours. During that application's pendency, the Commission amended Section 73.3555 with respect to, among other things, the number of stations that a licensee could own in the same market. *See* In re Revision of Radio Rules, *Report and Order*, 7 FCC Rcd 2755 (1992), *recon. granted in part, Memorandum Opinion and Order*, 7 FCC Rcd 6387 (1992); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7183 (1994).

[5] The *Astroline* analysis, as discussed in more detail in para. 8 *infra*, requires the Commission to determine whether the petition's allegations, assuming that they are true, show that a grant of the application would be *prima facie* inconsistent with the public interest; and, if so, whether a substantial and material question of fact is presented, which would require denial or designation of the subject application for hearing.

fidavits affirming that they will have no involvement with Lagniappe and that Grapevine presented no probative evidence to the contrary, other than speculation that the Brandon family would exercise control over Lagniappe's finances, personnel and programming.

5. Grapevine now contends that the Bureau failed to correctly evaluate whether it had established a substantial and material question of fact in accordance with the second step of the *Astroline* analysis. Grapevine argues that the Bureau did not consider "the totality of the evidence" that indicates Lagniappe is not a "truly independent entity." Specifically, Grapevine cites the fact that Anthony Brandon and AGM guaranteed the promissory note given to Kern by Lagniappe and that the letter of intent between Kern and Lagniappe requires the approval of the "Brandon family's bank" of that guarantee. Grapevine also points out that Brandon family members had acquired two other broadcast stations as individuals and subsequently transferred them to a family-run business.[6] Grapevine additionally contends that common control is evidenced by Rogers Brandon's co-ownership with Anthony Brandon of the KERN(AM/FM) studio site.[7] Grapevine further alleges that the Bureau failed to consider the significance of an alleged 1988 statement made to Grapevine's principal by Anthony Brandon concerning Rogers Brandon's ability to purchase Grapevine's station on behalf of the Brandon family. Finally, Grapevine submits that the Bureau, contrary to the mandate of *Astroline*, required Grapevine to "conclusively" prove its allegations thus misconstruing "the level of certainty" necessary to find the existence of a substantial and material question of fact.

6. Grapevine also argues that the Bureau erred in placing the burden upon Grapevine to prove the allegations of real-party-in-interest rather than placing the burden of proof upon Lagniappe. Grapevine asserts that Lagniappe did not provide such a showing because it failed to provide documents to address the following information requested by Grapevine: the source of the KGEO(AM)/KGFM-FM escrow deposit and the cash needed at closing; the corporate structure of various Brandon family enterprises; the nature of the relationship between Security Pacific National Bank and Lagniappe; and whether the Lagniappe minority shareholder is a Brandon family friend or if other Brandon family members have guaranteed his capital contribution to Lagniappe.

7. Grapevine also contends that since the December 31, 1992 consummation of the KGEO(AM)/KGFM-FM assignment, there is additional evidence of the Brandon family's common control of KERN(AM/FM) and KGEO(AM)/KGFM-FM. Specifically, Grapevine alleges: that Lagniappe has utilized the AGM sales force to sell time on KERN(AM/FM) and KGEO(AM)/KGFM-FM; that Lagniappe has used AGM's trade balance with a retailer to acquire certain office supplies for use by KGEO(AM)/KGFM-FM; and that KERN(AM/FM) and KGEO(AM)\KGFM-FM share a common employee. Grapevine also suggests that the KERN(AM/FM) general manager is also managing station KMYX(AM/FM), Bakersfield in violation of the Commission's cross-interest policy.[8]

8. *Discussion.* Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"), requires a two-step analysis for judging the sufficiency of Grapevine's petition. We must first consider whether the petition and its supporting affidavits contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d)(1) (1993). In making this determination, we assume that the specific facts set forth by the complaining party are true without reference to contrary evidence, and we are limited to consideration of the petition and its supporting affidavits during this initial determination. *Astroline*, 857 F.2d at 1561. Allegations within these documents that consist of "ultimate, conclusionary facts or more general affidavits . . . are not sufficient." *Gencom, Inc. v. FCC*, 832 F.2d 171, n.11 (D.C. Cir. 1987). If we determine that the petition satisfies the threshold standard, the inquiry proceeds to the second phase, in which we must then determine on the basis of the application, the pleadings filed, or other matters which we may officially notice, whether the petitioner presents a substantial and material question of fact. 47 U.S.C. § 309(d)(2) (1993). Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must deny or designate the application for hearing in accordance with 47 U.S.C. § 309(e) (1993).

9. After a careful review of the record, we find that the facts alleged by Grapevine, even if considered true, did not establish a *prima facie* issue as to whether Lawrence and Anthony Brandon were undisclosed real-parties-in-interest to the transaction.[9] Many of the facts alleged by Grapevine are similar to other cases where we have found that family relationships did not raise real-party-in-interest issues.[10] *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 654-55 (Rev. Bd. 1983), *recon. denied*, 94 FCC 2d 72, *review denied*, FCC 84-161 (April 13, 1984) (subsequent history omitted) (no real-party-in-interest issue based merely on financial and business ties among family members); *KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605 (1974) (no real-party-in-interest issue where transferee included sons of broadcasters in same market who received financing from their fathers). We have noted that where family members are involved, a petitioner attempting to raise a real-party-in-interest issue has a heavy burden, because even indepen-

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[6] *See* note 3, *supra*.

[7] Grapevine specifically alleges that the "short-term nature" of the studio site lease agreements casts doubt upon the "arms-length competition" between the Brandons.

[8] The Commission's cross-interest policy, in pertinent part, prohibits key employees of broadcast licensees from having "meaningful" cross-interests in stations that the licensee could not otherwise own under the multiple ownership rules. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). As discussed *infra*, a rule making is presently pending to review the Commission's cross-interest policy.

[9] Grapevine erroneously concludes that the Bureau had found that Grapevine made a *prima facie* showing that grant of the subject application would be inconsistent with the public interest. We note, however, that the Bureau applied the second step of the Section 309 (d) analysis after "assuming, *arguendo*," that the allegations presented a *prima facie* showing that grant of the application would be inconsistent with the public interest. As set forth *infra*, based upon our review of the record, we conclude that Grapevine's allegations did not present a *prima facie* case.

[10] "The test for determining whether a third party is a real-party-in-interest is whether that person has an ownership interest, or will be in a position to actually or potentially control the operation of the station." *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974) (citations omitted).

dent family relationships may have financial or business ties which would be persuasive indicia of common ownership or real-party status in non-family situations. *Cannon's Point*, 93 FCC 2d at 654-55; *see also* Clarification of Commission Policies Regarding Spousal Attribution, *Policy Statement*, 7 FCC Rcd 1920, 1922-23 (1992) (discussing indicia of common control in familial relationships). Grapevine's allegations, considered alone, do not meet its required burden under this analysis. For example, Grapevine has not shown that the subject application was part of a pattern of applications by the Brandon family involving entities with similar articles of incorporation, bylaws, financial structure, proposed policies, programming and consulting experts. *Compare Alan K. Levin (HDO)* (*"Levin"*), 45 Fed. Reg. 85,512, 85,519 (Dec. 29, 1980) (history of family interests and parallels between family members' supposedly independent stations and proposals suggested that applications were part of a family business). Nor has Grapevine shown that Anthony or Lawrence Brandon have had any pattern of continuing involvement in Lagniappe. *Compare Arnold L. Chase* (*"Chase"*), 5 FCC Rcd 1642, 1644 (1990) (facts indicating that son did not distance himself from father's broadcast business established *prima facie* issue). We find that this case is clearly distinguishable from *Levin* and *Chase*. As noted above, *Levin* involved a pattern of similar operating structures between allegedly independent entities and *Chase* involved a pattern of *de facto* control that existed prior to the filing of the application at issue. Neither factor exists here. Thus, Grapevine fails to sustain its burden of establishing a *prima facie* case that KGEO(AM)/KGFM-FM and KERN(AM/FM) will not be independently operated.[11] *See North Idaho Broadcasting Company*, 8 FCC Rcd 1637 (1993); *see also High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 435 (Rev. Bd. 1983).

10. Grapevine bases its *prima facie* showing upon the conclusions it draws from the facts asserted, *i.e.*, that the assignment to Lagniappe was a sham to circumvent the multiple ownership rules. However, it is the facts, standing alone, along with any supported or reasonable inference, that must support a *prima facie* case, not unsupported and unreasonable inference in addition to the facts proffered by a petitioner. *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). As stated above,[12] the facts alleged by Grapevine in the petition -- Anthony and Rogers Brandon's passive co-ownership of the KERN(AM/FM) studio site, AGM and Anthony Brandon's guarantee of Lagniappe's debt, an alleged 1988 statement by Anthony Brandon regarding his intention to purchase another Bakersfield station and the Brandons' common broadcast interests in other markets -- do not support a *prima facie* case that Anthony and Lawrence Brandon control Lagniappe.

11. Even assuming, *arguendo*, that Grapevine had presented a *prima facie* case that Lawrence and Anthony Brandon were undisclosed real-parties-in-interest to the application, we conclude that the Bureau properly found that the record establishes that no substantial and material question of fact exists. Under this second prong of the Section 309(d) analysis, we must consider "whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Id.* Although Grapevine alleges that the guarantee of the promissory note, the requirement that the Brandon's bank give its approval to that guarantee and the KERN(AM/FM) studio site lease are indicative of the Brandon family's ability to control Lagniappe, the Bureau noted that Grapevine failed to provide any evidence, other than its unsupported speculation, that demonstrates how these agreements enable Anthony or Lawrence to control Lagniappe.[13] Similarly, the Bureau found that Grapevine's allegations concerning the propriety of the Brandons' other broadcast operations also consisted of unsupported speculation absent legal relevance. The two cited instances where the Brandons transferred individually-acquired stations to family-run businesses did not violate Commission Rules and the Bureau noted that the Commission had approved both transfers. The Bureau further noted that Grapevine based its allegations regarding the Brandons' alleged tendency to ignore corporate operating structures upon a June 14, 1991 ownership report attributing voting control to a non-shareholder and the omission of a Brandon interest in the subject application. The Bureau, however, found that, despite those reporting oversights, the Brandons have consistently and accurately reported their interests and that these inadvertent errors did not represent an attempt to conceal information from the Commission. Moreover, we agree with the Bureau's conclusion that Grapevine failed to demonstrate the legal relevance of these isolated omissions to the subject application.

12. Although Grapevine now contends that the Bureau did not fully consider the significance of Anthony Brandon's alleged 1988 statement to Grapevine's principal concerning the Brandons' intent to acquire Grapevine's station through Rogers Brandon, we find that the record contains no evidence that Rogers Brandon misrepresented the facts with respect to the alleged statement. In this regard, we note that the alleged conversation took place four years before the filing of the subject application and it is reasonable to assume that the parties' recollections of an isolated conversation remote in time could differ. We disagree with Grapevine, however, that the conflicting affidavits on this question require the Commission to designate the application for hearing. "Contradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing before the Commission can judge whether an assignment would be in the public interest." *Broadcast Enterprises v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968). We find that Anthony Brandon's alleged hearsay statement of intent to assist his brother in the acquisition of a Bakersfield station, even if true, to be of little probative value given that it purportedly occurred four years before the filing of the

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[11] Grapevine's reliance on the substantive facts of *Astroline* is misplaced. In *Astroline*, the Court considered the totality of circumstances surrounding the Chase family's interrelationship in determining that a question of fact had been raised as to whether the proposed transferee had exercised *de facto* control over the licensee during the one-year period prior to the filing of the transfer of control application. In the instant case, Grapevine's allegations were based on potential future control and were purely speculative.

[12] *See* paragraph 4, *supra*.

[13] Grapevine's allegation concerning whether Rogers Brandon has misstated the length of the KERN(AM/FM) site lease is immaterial to the issue of control of Lagniappe. Also, we note that Rogers Brandon's affidavit states that he will not locate the KGEO(AM)/KGFM-FM studios at the KERN(AM/FM) site.

subject application and that Grapevine does not attempt to set forth the nature and extent of the alleged "assistance" that would circumvent the Commission's Rules or policies. Finally, we find Anthony and Lawrence Brandon's affidavits affirming that they will have no involvement with Lagniappe to be of greater relevance.

13. We find that the record also reveals that Lagniappe sustained its evidentiary burden in demonstrating its independence from the Brandon family enterprises. Commission precedent recognizes that when a "close, intertwined family relationship exists between principals," as here, the applicant has "the burden of establishing that, despite a close familial relationship, the stations involved are independently operated and controlled." *Alabama Radio Corporation*, 69 FCC 2d 1256, 1262 - 63 (1978). In support of demonstrating its independence, Lagniappe provided affidavits from Anthony and Lawrence Brandon affirming that they will have no involvement with Lagniappe. Also, Lagniappe provided copies of the KERN(AM/FM) studio lease and the security documents relating to the promissory note which demonstrate the arm's-length nature of these agreements with respect to the Brandon family. Furthermore, we disagree that consideration of the material requested by Grapevine, as set forth in paragraph 6, *supra*, is necessary to establish Lagniappe's independence from the Brandons. Based upon the record before us, we concur with the Bureau's finding that Lagniappe has provided all information necessary to meet its evidentiary burden in accordance with Commission precedent.

14. We also find that Grapevine's latest allegations concerning Lagniappe and AGM's post-combination actions do not, even when considered in connection with the other Brandon family relationships, raise a substantial and material question of fact as to whether AGM and Anthony Brandon are undisclosed real-parties-in-interest in Lagniappe. Two of the allegations - that Lagniappe shares an employee with AGM and that Lagniappe has used AGM's trade balance with a retailer are not supported by the record when taken as a whole. Grapevine provides no evidence, other than unsupported hearsay, to buttress those allegations. We note that Rogers Brandon has supplied an affidavit stating that Lagniappe has hired the former AGM employee for its exclusive use and that Lagniappe obtains office supplies through its own trade account with the retailer named in Grapevine's pleading.

15. With respect to Grapevine's allegations concerning the propriety of AGM providing advertising sales for Lagniappe, Lagniappe reports that it has entered into a joint-sales agreement with AGM. We note that the existence of such an agreement does not demonstrate the Brandon family's common control of the four stations in question. The Commission has approved joint-sales ventures conducted among stations located within the same market so long as the joint venturers retain control of their respective stations. *See* In re Revision of Radio Rules, *Report and Order*, (*"Report and Order"*) 7 FCC Rcd 2755 (1992), *recon. granted in part, Memorandum Opinion and Order\First Recon Order.*, (*MO&O*), 7 FCC Rcd 6387 (1992); *Memorandum Opinion and Order\Second Recon. Order*, FCC 94-267, 9 FCC Rcd 7183 (1994). Grapevine provides no evidence indicating that AGM, or any principal, has gained control of Lagniappe by means of the joint-sales agreement. Moreover, Grapevine's failure to provide relevant and material evidence of the Brandon family's *de facto* control of the station since the consummation serves to affirm the Bureau's prior decision that Grapevine's allegations were purely speculative. Furthermore, we are satisfied that the stations, even if commonly owned, would not raise an anticompetitive concern. The ratings and contour coverage data provided in Lagniappe's April 25, 1994 supplemental filing demonstrates that the combined audience shares of the four stations total less than 17%, in a market of more than 15 stations. Thus, if commonly owned, the stations would comply with the Commission's multiple ownership rules set forth in 47 C.F.R. § 73.3555 (1993). We further note that, in the above-referenced proceeding, the Commission declined to restrict sales-only ventures by not creating a cognizable attributable interest for licensees involved in those specific arrangements. *See MO&O* at ¶ 60 (attributable interest created for programming joint ventures among same-market licensees).

16. We conclude that the relationships between the Brandon family members and their respective stations, when considered separately or together, do not present an issue with respect to undisclosed real-parties-in-interest. We further note that none of these arrangements, when also considered separately or in combination, are violative of our multiple ownership rules or present policies governing the attribution of ownership or operating interests under those rules. However, we note that the Commission has recently initiated a rule making proceeding to examine, among other things, whether certain relationships,, standing alone or when viewed together with other relationships, demonstrate that an individual or entity not a party to an application exerts a degree of influence over station operations such that the individual or entity should be viewed as having a cognizable interest under the multiple ownership rules in the station in question. *See* Review of the Commission's Regulations Governing Attribution of Broadcast Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, *Notice of Proposed Rule Making* (*"NPRM"*), MM Docket Nos. 94-150, 92-51, 87-154, FCC Rcd (released January 12, 1995). In this proceeding, the Commission will assess the relevance of these types of relationships to our multiple ownership rules and attribution policies. We do not believe, however, that this prospective consideration of a change in our attribution criteria and cross-interest policy can be fairly used to alter the terms of our consent to transactions which have already been approved and consummated and which at the time they were consummated complied with our rules and existing case law. To the extent, of course, that our rule making decisions ultimately adopt criteria inconsistent with the relationship or arrangements in this case, our approval today does not prejudice our ability to review existing arrangements between AGM and Lagniappe in light of the determinations made in the referenced rule making proceeding.

17. In view of our determination that AGM and Lagniappe should not be considered jointly owned, operated or controlled, AGM's sharing of a key employee with KMYX(AM)/FM, Bakersfield, California, is not directly relevant to our decision here. However, we take this opportunity to address the key employee cross-ownership raised by Grapevine. Although our prior treatment of cross-interest issues served to prevent parties from serving as "key employees" at separately-owned stations in the same market, our multiple ownership rules, which the cross-interest policy is intended to vindicate, have changed substantially since the cross-interest policy was last amend-

ed.[14] Specifically, the local radio ownership rules now permit common ownership of multiple stations in the same market. In this particular case, the evidence before us suggests that the separately owned stations which here share a key employee could be jointly owned and operated in conformance with our multiple ownership rules.[15] Under these circumstances, we decline to raise an issue with respect to the key employee shared between KERN(AM/FM) and KMYX(AM/FM).

18. *Conclusion.* Pursuant to 47 C.F.R. § 1.115 (g), IT IS ORDERED, that the application for review filed by Grapevine Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[14] *See Notice of Inquiry* in MM Docket No. 87-154, 2 FCC Rcd 3699 (1987) (reexamination of existing cross-interest policy). That proceeding has been incorporated into the *NPRM*. The Commission has requested comments regarding, among other things, the key employee provisions of the cross-interest policy.

[15] Pursuant to the data in the April 25, 1994 supplemental filing, if commonly owned, the combined audience shares of KERN(AM\FM) and KMYX(AM\FM) would total less than 25%.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-125

In re Applications of

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. — File No. BR-88083OUA

For Renewal of License for
Station WCBM(AM),
Baltimore, Maryland

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. (Assignor) — File No. BAL-881117EB

and

WCBM MARYLAND, INC.
(Assignee)

For Consent to the Assignment of
License of Station WCBM(AM)
Baltimore, Maryland

MOUNT VERNON BROADCASTING
Baltimore, Maryland — File No. BP-880901AD

For a Construction Permit
for a New AM Station on 680 kHz at
Baltimore, Maryland

Appearances

Kathryn R. Schmeltzer, *Esq.*, *Gregory L. Masters, Esq.* and *Martin R. Leader, Esq.* on behalf of WCBM Maryland, Inc.; *Barry Wood, Esq.* on behalf of Mount Vernon Broadcasting; *Gary P. Schonman, Esq.* and *Charles Dziedzic, Esq.* on behalf of the Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: June 13, 1995; Released: June 20, 1995

PRELIMINARY STATEMENT

1. This proceeding is on remand following the Commission's release of its *Memorandum Opinion and Order* ("*MO&O*"), 9 FCC Rcd 533 (1994), in which it remanded the proceeding on its own motion on the following issues:

> (1) To determine whether Nicholas B. Mangione made material misrepresentations with respect to his involvement in the management of WCBM and the proposed management of WCBM Maryland, Inc.
>
> (2) To determine from the evidence adduced pursuant to Issue (1) above, whether WCBM Maryland, Inc. possesses the basic qualifications to be the licensee of the facilities sought herein.

The *MO&O* placed the burden of going forward with the evidence under Issue (1) upon Mount Vernon Broadcasting ("MVB") and the burden of proof under Issue (2) upon Bennett Gilbert Gaines ("Gaines") and WCBM Maryland.

2. A prehearing conference was held on February 11, 1994. Hearing sessions on the remanded issues were held on August 1, 2 and 3, 1994.

3. By *Memorandum Opinion and Order*, FCC 94M-531, released September 19, 1994, the Presiding Judge added the following issues in response to MVB's motion:

> (1) To determine whether Bennett Gilbert Gaines and/or WCBM Maryland, Inc. neglected their programs(s) of equal employment opportunity or engaged in a pattern of employment discrimination at WCBM from 1989 to the present;
>
> (2) To determine whether WCBM Maryland, Inc. will, if its assignment application is granted, institute and carry out an effective program of affirmative action at radio station WCBM;
>
> (3) To determine whether WCBM Maryland, Inc. engaged in improper *ex parte* communications in this proceeding; and
>
> (4) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Bennett Gilbert Gaines and WCBM Maryland, Inc. are qualified to be licensees of the Commission.

The burdens of proceeding and proof on these issues were placed upon WCBM Maryland (*Id.*).

4. Hearing sessions on the issues added by the Presiding Judge were held on December 14, 15, and 16, 1994 and on January 10, 1995. At the conclusion of the January 10, 1995 hearing session, the record was closed (Tr. 3517). *See Order*, FCC 95M-18, released January 25, 1995.

FINDINGS OF FACT

Remand and Misrepresentation Issue

5. The issue was specified because of the apparent discrepancy between Nicholas B. Mangione, Sr.'s ("Mangione") deposition testimony taken on October 12, 1990, and the subsequent sworn testimony by two former employees. According to the Commission:

> Mangione represented while under oath that he had spent between 30 and 60 hours a week 'physically' at the station. Deposition at 107. He further indicated that he was spending time at WCBM because he likes 'to be around the people out there. so [he] . . . can learn the business . . . .' Deposition at 66.

Remand Order, 9 FCC 534. By comparison, the Commission observed:

> Myron Laufer, a former employee of WCBM, testified that during his 11 month tenure as General Manager of WCBM he saw Mangione fewer than 10 times, that Mangione attended only one meeting at the station, that for one period he did not see Mangione for 2 or 3 months, and that Mangione did not average 30 hours per week at WCBM during the period that Laufer was General Manager. Mount Vernon Rebuttal Exh. 1 at p. 4. Bernard McCain, another former employee, testified that, although he worked at WCBM from October 1988 to March 1990, he never saw Mangione at the station more than once a week and that there were longer periods than a week when he never saw Mangione at the station. Mount Vernon Rebuttal Exh. 2 at p. 3.

Remand Order, 9 FCC Rcd 534. The Commission determined that, because Mangione had not been afforded an opportunity to explain or otherwise address the apparent discrepancy, a further evidentiary hearing was necessary.

6. According to his testimony at the remand hearing, Mangione sometimes spent between 30 and 60 hours a week on average physically at the station between October 1988 and November 1990 (Tr. 2588). Mangione explained that when he first began working at WCBM(AM) he spent a lot of time at the station learning all facets of the radio broadcasting business. The amount of time that Mangione physically spent at the station gradually diminished as he came to feel that he had things at WCBM(AM) under control (Tr. 2588).

7. During the first four or five months that he was running WCBM(AM), Mangione worked at the station between 30 and 60 hours a week (Tr. 2596). Thereafter, Mangione concedes, he was not always physically at WCBM(AM) when he worked on station-related matter (Tr. 2642). Between 1988 and 1990, most of the meetings that Mangione attended concerning WCBM(AM) were conducted at the station. However, some meetings concerning WCBM(AM) were conducted away from the radio station (Tr. 2612-1613). Mangione is unable to locate any of his calendars in which he referenced his appointments and meetings between 1988 and 1990 (Tr. 2607, 2615). Mangione believes the calendars were destroyed in 1993 or 1994 after the conclusion of a tax audit (Tr. 2617). Mangione also worked on station-related business while vacationing in Florida during periods in 1988, 1989, and 1990 (Tr. 2664-2672).

8. Mangione was asked twice at his deposition about the extent of his work on behalf of WCBM(AM). Mangione was asked initially how many hours per week he spent on station affairs, to which he responded "sometimes 40, sometimes 50, sometimes 60." Some time later during the deposition, inquiry was made as to how much time Mangione physically spent at WCBM(AM) on station affairs, to which Mangione responded, "I think I answered that before." Mangione insists that he never intended to misrepresent the amount of time he spent at the station; he simply did not focus on the distinction between devoting time generally to station business and being physically present at the station when doing so (WCBM Phase II Ex. pp. 2-3; Tr. 2657).

9. Thomas P. Nowicki, III (a/k/a Sean Casey) ("Nowicki") is currently employed at WCBM(AM). He began working at the station in November 1988. Between November 1988 and October 1990, the relevant period in question, Nowicki worked normal business hours, Monday through Friday. He also occasionally worked some weekends (WCBM Phase II Ex. 3, pp. 1-2). Nowicki frequently saw Mangione or Mangione's car at the radio station between November 1988 and October 1990 (WCBM Phase II Ex. 3, p. 1; Tr. 2692). Sometimes Mangione would discuss station-related matters with Nowicki. At other times, Mangione would simply pop his head in Nowicki's studio for a moment (Tr. 2692, 2698). According to Nowicki, Mangione attended station meetings every calendar quarter (Tr. 2703).

10. Frank Luber ("Luber") also is currently employed at WCBM(AM). Luber started working at the radio station in October 1988 and October 1990, Luber recalls seeing Mangione at WCBM(AM) on many occasions. Luber frequently met with Mangione to discuss station-related business during the relevant time period (WCBM Phase II Ex. 7, pp. 1-2; Tr. 2710-2711). When he was in Florida, Mangione spoke on occasion with Luber by telephone about station matters (Tr. 2713). Although Mangione was at WCBM(AM) more often during the station's start-up period, he often worked on station-related business by telephone during the latter part of the relevant time period. There was never a lengthy period when Mangione was not at the station (Tr. 2721).

11. Between October 1988 and October 1990, Joe Armacost ("Armacost") worked as a producer at WCBM(AM). Although his regular shift was 5:00 a.m. to 11:00 a.m., Armacost often remained at the station until approximately noon or 1:00 p.m. Armacost believes that during the relevant period, Mangione spent a considerable amount of time at WCBM(AM), although Mangione's time at the station varied from day-to-day (WCBM Phase II Ex. 5, p. 1). Armacost is unable to categorically state that he saw Mangione at WCBM(AM) during the relevant period between 30 and 60 hours per week (Tr. 2758-2759).

12. Gary St. Our ("St. Our") has been employed at WCBM since October 1988. During the period from October 1988 through October 1990, St. Our worked the 10:00 a.m. to 6:00 p.m. shift, although from 3:00 p.m. to 6:00 p.m. each day he was in a studio where he was unable to observe persons elsewhere at the radio station (WCBM Phase II Ex. 6, p. 1; Tr. 2770). According to St. Our, Mangione was physically at the station virtually every day, in excess of 30 hours per week, during the first few months of the relevant time period. Beyond the first few months, St. Our believes Mangione visited the station less frequently, perhaps several times per week (Tr. 2771-2772, 2774).

13. Thomas A. Marr ("Marr") has worked at WCBM(AM) since October 1988. Although Marr testified that Mangione's visits to WCBM(AM) between October 1988 and October 1990 were frequent and regular, he was unable to estimate the number of hours per week that Mangione was present at the statio during the relevant time period (WCBM Phase II Ex. 2, p. 1; Tr. 2782).

14. Olivia Contract ("Contract") has worked as an intern and subsequently as a paid employee of WCBM(AM) since March 1990. Although Contract testified that between March 1990 and October 1990, she saw Mangione all the time at WCBM(AM), she was unable to specify the number of hours that Mangione was actually at the radio station (WCBM Phase II Ex. 4, p. 1; Tr. 2794). Contract was not at

the station every day. Furthermore, on the days when she was at WCBM(AM), she was not always there for a full eight-hour shift (Tr. 2794-2795).

15. Dwight Weller ("Weller") worked at WCBM(AM) from September 1989 through December 1993. Between September 1989 and October 1990, Weller worked weekdays, from 9:00 a.m. to 5:00 p.m. During the period of time that he was employed by WCBM(AM), Weller operated a business of his own called Weller Audio Visual. He was ultimately informed by station management that he was being replaced because he could not devote his full attention to WCBM(AM)'s needs (Mt. Vernon Phase II Ex. 2, p. 1; Tr. 2844-2849).

16. Weller claims that Mangione spent no more than five hours, if that much, at WCBM(AM). According to Weller, Mangione visited the radio station once or twice per month and stayed no longer than three hours during any one visit (Tr. 2829, 2838, 2849). There were time when Weller say Mangione's car in the radio station parking lot, but he did not actually see Mangione. Weller assumed that if Mangione's car was parked in the radio station's parking lot, Mangione must be in the radio station (Tr. 2854).

EEO Issue

17. The only allegations of racial discrimination at WCBM(AM), and the primary bases for the addition of the EEO issues in this case, are contained in a Declaration dated August 2, 1994 by Dwight Weller, which was appended to MBV's August 5, 1994 Motion to Enlarge Issues. Among other things, Weller claims to have been informed by a former general manager of the Station, Michael J. Plumstead, that Mangione did not want Black persons working at WCBM(AM) and that Weller also alleges that he was scorned by the station's program director, Thomas Nowicki, for having hired a Black technician (Mount Vernon Ex. 2).

18. Michael J. Plumstead ("Plumstead") served as general manager of WCBM(AM) from November 1989 through December 1992. Plumstead states that at no time during his tenure at WCBM(AM) was he told by Mangione that Mangione did not want Black persons working at the radio station. Plumstead further states that he never conveyed to anyone that Mangione did not want Black persons working at WCBM(AM) (Gaines/WCBM Phase III, Ex. 5, p. 1).

19. Plumstead claims that he maintained an effective EEO program at the station during the time he was general manager. He is not sure whether the program was in writing. According to Plumstead, the thrust of the station's EEO program was to hire the best qualified people and to have an active recruiting program insofar as women and Blacks are concerned. During his tenure at the station, Plumstead was responsible for overseeing compliance with the Commission's EEO rules and for implementing the station's EEO program (Tr. 3067-3069).

20. According to Plumstead, the station hired approximately 15 to 25 persons (full-time and part-time) during his three-year tenure at WCBM(AM). Plumstead further claims that on each and every one of the 15 to 25 occasions when there was an opening, the station placed a classified advertisement in the Baltimore Sun, a daily newspaper of general circulation, and in the Baltimore African-American, a weekly publication oriented toward the Black community. Plumstead maintains that he kept records of all classified advertisements that the station ran during his tenure. However, WCBM Maryland, Inc. proffered invoices for fewer than a half dozen classified advertisements (Gaines/WCBM Phase III, Ex. 6; Tr. 3067-3069, 3071-3074, 3077-3078, 3103, 3110).

21. Plumstead believes that the station contacted Morgan State University, a minority specific educational institution, on only three occasions during his tenure at WCBM(AM). All of the contacts with Morgan State University were by telephone. No minority specific organizations were contacted when there were job vacancies because, according to Plumstead, it would "just slow things down." (Tr. 3072-3074).

22. Plumstead testified that there was no requisite number of people from which a successful candidate was selected on each occasion. Although it usually came down to a choice between just two people, Plumstead really never looked at the particular number of people available (Tr. 3076). Plumstead maintains that he kept records of all interviews that he conducted (Tr. 3077). However, no such records were proffered by WCBM Maryland, Inc.

23. According to Plumstead, during the three year period that he served as general manager of WCBM(AM), there was no formal process in place by which he and his staff assessed the effectiveness of the station's EEO program. According to Plumstead:

> we weren't a very big radio station, we weren't a very big company so there wasn't a tremendous need nor was there time to prepare a lot of these, you know, administrative things that I'm sure, you know, looked good to people that are looking at them but they just eat up time.

(Tr. 3087).

24. Plumstead discovered at some point that no Annual Employment Report (FCC Form 395-B) for 1989 had been filed with the Commission. The decision was made to file both the 1989 Annual Employment Report and the 1990 Annual Employment Report at the same time. Plumstead reviewed both reports before they were filed with the Commission, and he concluded that the information contained in each report satisfied the Commission's requirements (Tr. 3080-3093). Plumstead could not recall whether an Annual Employment Report for 1991 or 1992 was filed with the Commission (Tr. 3094-3095).

25. Thomas Nowicki WCBM(AM)'s program director, denies ever telling Weller not to hire Black technicians (Mount Vernon Ex. 2). Nowicki vehemently maintains that any suggestion to the contrary is an outright fabrication (Tr. 3126-3127).

26. Nowicki believes that WCBM(AM)'s EEO program in 1988 was the program contained in the station's pending renewal application (Mount Vernon Ex. 27, p. 3; Tr. 3163). According to Nowicki, the EEO program that is contained in the station's renewal application remains WCBM(AM)'s EEO program (Tr. 3166).

27. In April 1991, Nowicki assumed responsibility for hiring on-air announcers and board operators/producers. He had no responsibility for hiring persons in any other capacity at the station (e.g., sales, engineering, clerical, etc.) (Tr. 3166). Since April 1991, Nowicki has hired approximately 15 board operators/producers and six or seven on-air announcers (full-time and part-time) (Tr. 3177). According to Nowicki, for some of the job openings which he was responsible for filling, the station contacted by telephone the Broadcast Institute of Maryland, a voca-

tional-technical school, and Morgan State University. According to Nowicki, the Broadcast Institute of Maryland has a reputation of providing minority applicants to radio stations. Neither institution was contacted on a routine basis, and Nowicki is unable to recall the names of any referrals from either institution. Nowicki also conducted a search at various radio stations for qualified candidates. Because he usually needed to hire someone fast, he claims he did not have the "luxury" of going through a lengthy interview process. Vacancy announcements were also posted at WCBM(AM) (Tr. 3173-3174). Nowicki does not recall ever placing a classified advertisement in a newspaper for an on-air announcer. He does recall, however, sometimes placing advertisements in the Baltimore Sun or the Baltimore African-American for board operators/producers. Nowicki does not recall contacting any minority specific organizations on any occasion to fill an on-air announcer or board operator/producer position (Tr. 3176-3179).

28. In order to assess the effectiveness of the station's EEO program, Nowicki had two or three informal discussions with members of his immediate staff prior to May 1992. According to Nowicki, there were concerns as to "whether or not percentage-wise WCBM(AM) was in compliance." (Tr. 3179-3182). Although Nowicki believes that the station has, by and large, been in compliance, he concedes that there came a time as a result of budget cutbacks and the abolishment of some positions when WCBM(AM) employed just one Black person, a situation about which Nowicki became concerned. Nowicki also acknowledges that WCBM(AM) has not, for the last three to five years, maintained proper records of its recruitment efforts (Tr. 3188-3190). In retrospect, Nowicki believes that WCBM(AM)'s inadequate record keeping had a deleterious impact on management's ability to assess the effectiveness of the station's EEO program (Tr. 3195-3196).

29. Bennett Gilbert Gaines, as the court appointed Interlocutory Receiver for Magic 680, Inc., is the licensee of WCBM(AM). Although he asserts that there has been no employment discrimination or pattern of employment discrimination at the radio station during the relevant years in question, Gaines concedes that WCBM(AM)'s EEO program, to the extent that it requires appropriate record-keeping, has not always been the best (WCBM Phase III, Ex. 1, p. 1-2). In Gaines' view, WCBM(AM) fell short of the Commission's requirements by not filing Annual Employment Reports on time. Also, the station did not maintain proper documentation of its recruitment efforts (Tr. 3258-3259).

30. According to Gaines, the station's current EEO program is essentially the same EEO program contained in the pending renewal application (Tr. 3281-3284). Since October 1988, it has been the routine practice of WCBM(AM) when recruiting individuals to work at the station to place classified advertisements in the Baltimore Sun and the Baltimore African-American; contact educational institutions; and speak with existing employees. Gaines admits, however, to having no knowledge as to whether advertisements were placed in the two publications in each and every instance that a vacancy arose. Gaines also does not know if educational institutions were contacted every time there was a vacancy (Tr. 3285-3287).

31. Gaines recalls meeting with station management at least a couple of times each year to discuss a wide variety of topics including, from time to time, the station's employment practices and EEO program. Gaines' routine for assessing the effectiveness of WCBM(AM)'s EEO Program was limited to visiting the station and observing the number of employees who were members of minority groups (Tr. 3291). Gaines formed no opinion about the effectiveness of the station's EEO program at the time he signed WCBM(AM)'s 1989, 1990, or 1993 Annual Employment Report. The station did not timely file an Annual Employment Report for either 1991 or 1992. Gaines does not know why the station failed to timely file reports for those years (Tr. 3289-3300).

32. Mangione estimates that there have been approximately 75 vacancies at WCBM(AM) since his company, WCBM Maryland, Inc., began operating the radio station. In attempting to fill each of the vacancies, Mangione initially claimed that letters were routinely sent to different minority specific organizations and several educational institutions, including Towson State University, Morgan State University, Coppin State University, and the University of Maryland. However, WCBM Maryland did not proffer copies of any correspondence purportedly sent to educational institutions or minority specific organizations, and Mangione subsequently testified that only about six to nine letters actually went out. Additionally, Mangione was unable to estimate the number of referrals that resulted from the station's contacts with any of the educational institutions. According to Mangione, the station also placed advertisements in the Baltimore Sun, the Baltimore African American, and the Jeffersonian, although not routinely for each vacancy. Mangione does not think that the Jeffersonian is a minority-specific publication (Tr. 3444-3459). Of the approximately 75 vacancies that have come up since WCBM Maryland, Inc. began operating the station, approximately 20 positions (full and part-time) were filled with minorities (Gaines/WCBM Phase III Ex. 3, pp. 8-9).

33. Mangione testified that he periodically discussed EEO matters with station management. The subject generally came up when there was a vacancy to be filled (Tr. 3464). Mangione assessed the effectiveness of the station's EEO program by counting the number of minorities who worked at the station (Tr. 3467). Mangione concedes that he knew the station was "falling back in hiring minorities" at one point in time (Tr. 3465, 3467). Mangione never blamed the station's recruitment practices for the lack of sufficient numbers of minorities employed at WCBM(AM). He always thought that if the station did not have enough minorities, it was because the pay wasn't high enough to attract them (Tr. 3469-3470). Mangione never examined the station's FCC Forms 395-B (Annual Employment Report) in order to assess the effectiveness of WCBM(AM)'s EEO program (Tr. 3471).

34. In the last few months, Mangione has implemented changes in the station's EEO program to hire more minorities. Toward this end, it has been decided that the next three vacancies at WCBM(AM) will be available only to, and filled with, minorities (Tr. 3472, 3474, 3480).

Ex Parte Issue

35. In 1989, Mangione made an ex parte presentation to United States Senator Paul Sarbanes (Mount Vernon Phase III Ex. 6). Mangione learned from his counsel after he sent his letter to Senator Sarbanes that the presentation constituted a prohibited *ex parte* contact that violated the Commission's *ex parte* rules (Tr. 3495).

36. On June 13, 1994, Mangione made another ex parte presentation, this time to FCC Chairman Reed Hundt (Mount Vernon Phase III Ex. 7). When he sent his letter to Chairman Hundt, Mangione did not think he was doing anything that was impermissible; he was simply venting his frustration over the length of the instant proceeding. Mangione claims he never intended by his letter to Chairman Hundt to influence any particular decision in this case (Gaines/WCBM Phase III Ex. 2, pp. 2-3; Tr. 3502-3505). Mangione believed that someone of Chairman Hundt's stature could expedite the hearing and bring this case to an end once and for all. Mangione did not care whether he won or lost as a result; he simply wanted the proceeding to be concluded and a final determination rendered (Tr. 3506). WCBM Maryland, Inc.'s counsel sent copies of Mangione's June 13, 1994, letter to the other parties in this proceeding on July 11, 1994 (Gaines/WCBM Phase III Ex. 8).

CONCLUSIONS OF LAW

37. It is well established that misrepresentation requires a false statement of fact made with an intent to deceive. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). The record shows that Mangione did not deliberately lie in the course of testifying at his deposition. Mangione was questioned more than once during his deposition about the amount of time he worked on WCBM(AM) business. In one instance, Mangione was questioned about the time he physically spent at the station, and in another instance, he was questioned about the amount of time he devoted to station affairs without regard to location. Mangione insists that he never intended during the deposition to convey that he always was physically present at the station when he claimed to have devoted 30 to 60 hours week to station-related business. Rather, Mangione explains that he was physically at WCBM(AM)'s studios up to 60 hours per week during the initial start-up period, and he subsequently devoted up to that many hours on station affairs, some of which from other locations.

38. Dwight Weller's claim that Mangione was rarely present at the radio station is rejected. Weller did not become employed at WCBM(AM) until well after the start-up period during which Mangione asserts he spent most of his time at the station. Weller's testimony is also flatly contradicted by the testimony of several current and former employees. Indeed, Thomas Nowicki, Frank Luber, Joe Armacost, Gary St. Our, Thomas Marr, and Olivia Contract all consistently testified to having seen Mangione at WCBM(AM) more often than that suggested by Weller.

39. Accordingly, IT IS ORDERED that the misrepresentation issue IS RESOLVED in WCBM Maryland's favor.

EEO Issue

40. There is no record evidence that there was a pattern of employment discrimination against minorities at the radio station. However, WCBM Maryland, Inc. and, ultimately, Bennett Gilbert Gaines, failed to maintain adequate records documenting the station's recruitment efforts; failed to consistently contact recruitment sources likely to refer minorities when vacancies occurred; failed to evaluate the station's employment profile and job turnover against the availability of minorities in its recruitment area; and failed to implement a formal process for analyzing WCBM(AM)'s EEO performance.

41. In an attempt to demonstrate to the Commission that WCBM(AM) has taken steps to "beef up" its EEO program and implement meaningful EEO practices, Mangione testified that the next three vacancies at the station will be available to, and reserved solely for, minorities. Such a policy is discriminatory on its face and grossly inconsistent with the Commission's EEO Rules. *See Alabama/Georgia Broadcasting Stations*, 95 FCC 2d 1, 9 (1983).

Ex Parte Issue

42. Mangione made two improper *ex parte* presentations in this proceeding. In connection with the one made in 1989 involving Senator Sarbanes, Mangione testified that it wasn't until after he sent the Senator the letter that he was apprised of the *Commission's ex parte* rule by his counsel. With the second letter to Chairman Hundt, Mangione alleges that he merely tried to have the proceeding expedited and was not seeking any favorable resolution in his behalf. Mangione's explanations are accepted in mitigation of the aforementioned *ex parte* violations.

ULTIMATE CONCLUSIONS

43. The misrepresentation issue has been resolved in WCBM's favor. However, it has been found that both Bennett Gilbert Gaines and WCBM Maryland, although not guilty of any discrimination against minorities, did fail to maintain an effective EEO program. Notwithstanding these findings, it is concluded that Bennett Gilbert Gaines and WCBM Maryland are basically qualified to be a Commission licensee.

44. The competing application of Mount Vernon Broadcasting has been dismissed pursuant to its approved settlement agreement with Gaines and WCBM Maryland. *See Memorandum Opinion and Order*, FCC 95M-139, filed concurrently with the Supplemental Initial Decision. There is no impediment to the grant of the renewal and assignment applications. However, The Bureau states that in order to achieve effective compliance with the Commission's EEO policy, the station's new license term should be limited to two years during which time WCBM Maryland, Inc. should be required to make periodic written reports to the Commission in accordance with the attached Appendix. Gaines and WCBM Maryland have agreed to accept these conditions. *See* Joint Reply dated April 24, 1995.

Accordingly, IT IS ORDERED, that unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in

accordance with Section 1.276 of the Rules, the renewal and assignment applications ARE GRANTED,[1] subject to the conditions stated in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

Attachment

APPENDIX

The licensee of Station WCBM(AM), Baltimore, Maryland, shall submit to the Commission, on the first and second anniversaries of the date on which the grant of the captioned application for renewal of license of WCBM(AM) becomes final, an original and one copy of a Report containing the following information:

(a) Each Report shall contain two lists, one identifying all full-time vacancies during the preceding 12-month period, and the other identifying all part-time vacancies during the preceding 12-month period. As to each vacancy, specify: (1) the specific job title and FCC job category of the position; (2) the recruitment sources contacted; (3) the race or national origin, gender, and the referral source of each applicant; and (4) the race or national origin and gender of the person hired.

(b) Each Report shall further contain a list of employees on the WCBM(AM) payroll as of the first day of the month in which the Report is filed. Each employee shall be identified by his or her (1) job title and FCC job category; (2) full or part-time status; (3) date of hire, (4) gender; (5) and race or national origin.

(c) Each Report shall further specify in detail all of the licensee's efforts to recruit minorities for each position filled during the preceding 12-month period, including identification of sources used and whether any applicants declined actual offers of employment. The licensee may submit any other information relevant to the station's EEO performance and efforts thereunder.

[1] In the event exceptions are not filed within 30 days after the release of this Supplemental Decision and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-82

In the Matter of

Amendment of Section 73.202(b), RM-8630
Table of Allotments,
FM Broadcast Stations.
(Monticello, Perry, Quincy,
and Woodville, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1995; Released: June 19, 1995

By the Chief, Allocations Branch:

Comment Date: August 10, 1995
Reply Comment Date: August 25, 1995

1. Before the Commission for consideration is a petition for rule making filed by Great South Broadcasting, Inc. ("petitioner"), licensee of WXSR(FM), Channel 268C2, Quincy, Florida, requesting the reallotment of Channel 268C2 from Quincy, Florida to Woodville, Florida, and the modification of its license for Station WXSR(FM) to specify Woodville as its community of license. In order to accomplish the reallotment from Quincy to Woodville, petitioner also requests the substitution of Channel 289C3 for Channel 270C3 at Monticello, Florida, and the modification of Station WJPH(FM)'s license to specify Channel 289C3, and the substitution of Channel 221A for Channel 288A at Perry, Florida, and the modification of Station WNFK(FM)'s license to specify Channel 221A. Petitioners state their intentions to apply for the respective channels, if allotted.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License* ("Modification"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Petitioner states that the reallotment of Channel 268C2 from Quincy (population 7,444) to Woodville (population 2,760)[1] is mutually exclusive with the present allotment of Channel 268C2 at Quincy. Petitioner claims that its proposal will result in a preferential arrangement of allotments since it would provide Woodville with its first local aural transmission service. Petitioner notes that Quincy would not lose its sole local aural transmission service, since it will continue to receive service from Station WWSD(AM), and Station WTPS(FM) an outstanding construction permit (currently off the air) at Quincy.[2] Petitioner notes that both Quincy and Woodville are located outside the Tallahassee Urbanized Area. Furthermore, in order to accommodate the reallotment of Channel 268C2 from Quincy to Woodville, petitioner has obtained the consent of the licensees of Station WJPH(FM), Monticello, Florida, and Station WNFK(FM), Perry, Florida, for the channel substitutions. Petitioner has also agreed to reimburse each licensee for the legitimate costs associated with the channel changes.

3. In further support of its proposal, petitioner states that Woodville is a Census Designated Place, located in Leon County with a 1990 U. S. Census population of 2,760 persons, and has no local aural transmission service. Petitioner also states that Woodville has several civic organizations, approximately 100 businesses, a bank, two hardware stores, an automobile dealership, several auto parts stores, a grocery store, two cabinet stores and various other retail outlets. Woodville has its own post office, volunteer fire department, recreational park, elementary school and two voting precincts.

4. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. However, we believe the proposal warrants consideration, since it would not deprive Quincy of its only local aural transmission service, and would provide the community of Woodville with its first local aural transmission service. Nonetheless, we must take into account the fact that existing service will be deleted from a community. With respect to evaluating proposals to change the community of license, the Commission has stated, "The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting a channel from one community to another." *See Modifications, supra.*, 5 FCC Rcd at 7097 (1990). Since we are concerned with the loss of service to the community of Quincy, we request petitioner to submit any additional information as the overall public interest benefits that would be advanced from a grant of this proposal. In addition, we request petitioner to provide information showing the areas and populations which will receive new service and the areas and populations which will lose existing service if Station WXSR(FM), Channel 268C2 is reallotted to Woodville. The study should also indicate the number of reception services which are now available with the gain and loss areas.

TECHNICAL SUMMARY

5. An engineering analysis has determined that Channel 268C2 can be reallotted from Quincy to Woodville in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.7 kilometers (1.1 miles) west[3] in order to avoid a short-spacing to Station WHJX(FM), Channel 268C, Brunswick,

[1] Population figures are taken from the 1990 U.S. Census.
[2] We note the pendency of a proposal filed in MM Docket No. 93-229, 8 FCC Rcd 5257 (1993), on behalf of Bitner-James Partnership, permittee of Station WTPS(FM), requesting the substitution of Channel 264C3 for Channel 264A at Quincy and the reallotment of Channel 264C3 from Quincy to Midway, Florida.
[3] The coordinates for Channel 268C2 at Woodville, Florida are North Latitude 30-18-53 and West Longitude 84-15-57.

Georgia: Channel 289C3 can be substituted for Channel 270C3 at Monticello, Florida, in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.2 kilometers (8.8 miles) south.[4] in order to avoid a short-spacing to Station WFFM(FM), Channel 289A, Ashburn, Georgia; Channel 221A can be substituted for Channel 288A at Perry, Florida, in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.6 kilometers (1.0 miles) southeast at the construction permit site (BPH-940930IZ) for Station WNFK(FM).[5]

6. The Commission usually does not require a station to change its transmitter site in order to accommodate a new allotment, without the consent of the affected station. Petitioner has provided a copy of an agreement with Webster Broadcasting, Inc., licensee of Station WJPH(FM), Monticello, Florida, consenting to change its existing transmitter site in order to accommodate the proposed change in community of license from Quincy, Florida, to Woodville, Florida. In addition, petitioner has also provided a copy of an agreement with RAHU Broadcasting Co., licensee of Station WNFK(FM), Perry, Florida, consenting to the proposed channel substitution for Station WNFK(FM). Since the licensee of Station WJPH(FM), Monticello, Florida, and the licensee of Station WNFK(FM), Perry, Florida have consented to the proposed change in transmitter site and channel substitutions, we shall not issue *Orders to Show Cause;* however, we will serve all parties with a copy of the *Notice*.

7. The Commission believes it would be in the public interest toseek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Quincy, Florida	264A, 268C2	264A
Woodville, Florida	–	268C2
Monticello, Florida	270C3	289C3
Perry, Florida	288A	221A

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **August 10, 1995**, and reply comments on or before **August 25, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
Shaun A. Maher
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Attorneys for Petitioner)

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested a copy of this *Notice* to:

Webster Broadcasting, Inc.
400 N. Michigan Ave., #200
Chicago, IL 60611
(Licensee of Station WJPH(FM))

RAHU Broadcasting, Inc.
P.O. Box 779
Perry, FL 32347
(Licensee of Station WNFK(FM))

Joseph E. Doyle, Esq.
Jenner & Block
One IBM Plaza
Chicago, IL 60611
(Counsel for Station WJPH(FM))

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[4] The coordinates for Channel 289C3 at Monticello are North Latitude 30-25-05 and West Longitude 83-50-18.
[5] The coordinates for Channel 221A at Perry are North Latitude 30-06-27 and West Longitude 83-34-00.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-83

In the Matter of

Amendment of Section 73.202(b), RM-8634
Table of Allotments,
FM Broadcast Stations.
(Littlefield, Wolfforth and
Tahoka, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1995; Released: June 19, 1995

Comment Date: August 10, 1995
Reply Comment Date: August 25, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by 21st Century Radio Ventures, Inc. ("petitioner"), permittee of Station KAIQ(FM), Channel 238C3, Littlefield, Texas, requesting the reallotment of Channel 238C3 from Littlefield to Wolfforth, Texas, and the modification of its construction permit to specify Wolfforth as its community of license. Petitioner also requests the deletion of vacant Channel 237A at Tahoka, Texas, in the alternative, the substitution of Channel 278A for Channel 237A at Tahoka.[1] Petitioner states it will apply for Channel 238C3 at Wolfforth, if allotted.[2]

2. Petitioner seeks modification of Station KAIQ(FM)'s construction permit pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. Petitioner states that adoption of its proposal will result in a preferential arrangement of allotments by bringing a first local aural transmission service to Wolfforth, while Littlefield will retain service from Station KZZN(AM). Petitioner notes that Wolfforth is an incorporated community with a population of 1,941 persons. Petitioner adds that Wolfforth is governed independently (Mayor and five council members) and hold elections for its own officials. Moreover, Wolfforth operates its own fire department and collects certain separate "*ad valorem*" property taxes. Petitioner states the reallotment will result in a dramatic increase in service to populated areas, with service increasing from 35,241 to 252,733 persons.[3]

3. We believe the proposal warrants consideration because the proposed reallotment of Channel 238C3 from Littlefield to Wolfforth, Texas, could provide the community with its first local aural transmission service. Further, the reallotment of Channel 238C3 to Wolfforth will not deprive Littlefield of its sole local aural transmission service or result in the reallotment of a channel from a rural community to one within an urbanized area. Channel 238C3 can be reallotted from Littlefield to Wolfforth, Texas, in compliance with the minimum distance separation requirements with a site restriction of 9.3 kilometers (5.8 miles) south to accommodate petitioner's desired transmitter site.[4] As requested, we also propose to modify petitioner's construction permit for Station KAIQ(FM) to specify Wolfforth as the station's community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept expressions of interest in the use of Channel 238C3 at Wolfforth or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. We shall also solicit comments on whether we should delete vacant and unapplied for Channel 237A at Tahoka, Texas. In accordance with Commission policy, if no party expresses an interest in use of Channel 237A at Tahoka, during the comment period in this proceeding, we shall delete the channel for lack of interest. However, if interest is expressed to retain Channel 237A and petitioner's proposal is adopted, we propose to substitute Channel 278A for Channel 237A at Tahoka. Channel 278A can be allotted to Tahoka in compliance with the minimum distance separation requirements with a site restriction of 5.6 kilometers (3.5 miles) northeast to accommodate petitioner's reallotment proposal.[5]

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[1] Petitioner also suggests the allotment of Channel 240C3 at Littlefield, Texas, as a replacement for Channel 238C3. However, petitioner has not expressed an interest in applying for Channel 240C3 at Littlefield, therefore, we will not propose the allotment of the channel to the community.

[2] Although petitioner's request indicates that the original copy of its proposal was signed, petitioner failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and certifications. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.42 (1990). Petitioner is requested to rectify this omission in its comments.

[3] Petitioner states there will be a theoretical loss in service to 17,638 persons and denotes the loss is theoretical since Station KAIQ(FM) is unbuilt and has never been on the air. In addition, it advises that Station KAIQ(FM) was obtained on a first-come first-serve basis and as a result is not subject to any comparative hearing process restriction to change its community of license; citing, *Memorandum and Opinion and Order*, 5 FCC Rcd at 7097.

[4] The coordinates for Channel 238C3 at Wolfforth are North Latitude 33-25-48 and West Longitude 102-03-35.

[5] The coordinates for Channel 278A at Tahoka are North Latitude 33-11-34 and West Longitude 101-44-44.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments. Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
	Option I	
Littlefield, Texas	238C3	–
Wolfforth, Texas	–	238C3
Tahoka, Texas	237A	–
	Option II	
Littlefield, Texas	238C3	–
Wolfforth, Texas	–	238C3
Tahoka, Texas	237A	278A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 10, 1995**, and reply comments on or before **August 25, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Primm

21st Century Radio Ventures, Inc.

713 Broadway

Santa Monica, California 90401

(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-57

In the Matter of

Amendment of Section 73.202(b), RM-8467
Table of Allotments,
FM Broadcast Stations.
(Sanger and Sherman, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 12, 1995; Released: June 19, 1995

By the Chief, Allocations Branch:

1. At the request of Harmon G. Husbands ("Husbands"), licensee of Station KWSM(FM) and proposed Assignor, along with Durant Broadcasting Corporation proposed Assignee ("Durant") of Station KWSM(FM), Channel 281A, Sherman, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3271 (1994), proposing the substitution of Channel 281C3 for Channel 281A at Sherman, the reallotment of Channel 281C3 from Sherman to Sanger, Texas, and modification of Station KWSM(FM)'s license to specify Sanger as the community of license. Husbands filed untimely comments and a motion to accept late-filed supplemental comments.[1] Durant, Husbands and the Davis Family Trust submitted late-filed reply comments.[2]

2. We believe that it is in the public interest to substitute Channel 281C3 for Channel 281A at Sherman, and to reallot Channel 281C3 from Sherman (which is part of the Denison-Sherman Urbanized Area) to Sanger, Texas, and to modify Station KWSM(FM)'s license accordingly since this would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedure. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.[3]

3. In making this comparison, we find that the proposed reallotment of Channel 281C3 from Sherman to Sanger triggers priority 3 because Sanger (population of 3,508)[4] would be provided with its first local aural transmission service. By contrast, retention of the existing arrangement of allotments would not trigger priority 3 since, in addition to KWSM(FM), Stations KIKM(FM), KXEB(AM) and KJIM(AM) are also licensed to service Sherman.[5] Our engineering analysis determined that the reallotment will enable Station KWSM(FM), from its new proposed site, to upgrade its station and provide reception service to an additional 223,209 persons. The removal of Station KWSM(FM) will create a reception service loss area that includes 79,137 persons. However, our concerns about this loss area are mitigated by the fact that all of the population located in this loss area will continue to receive at least five full-time aural reception services.

4. Channel 281C3 can be allotted to Sanger in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.3 kilometers (6.4 miles) northwest to accommodate petitioner's desired site.[6] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license of Station KWSM-FM to specify Sanger, Texas, as its community of license on Channel 281C3, in lieu of its use at Sherman, Texas.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sherman, Texas	244A
Sanger, Texas	281C3

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Davis Family Trust for Station

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[1] Husbands filed comments restating his expression of interest in the allotment of Channel 281C3 to Sanger, as well as an engineering study depicting the loss and gains areas created by their proposal. We will accept Husbands' comments since the allotment is unopposed and can be made without adversely affecting any other proposal.

[2] At the time this proposal was filed Durant was the proposed Assignee of Station KWSM(FM) at Sherman, Texas. However, since that time the Commission has dismissed Durant's application for assignment of license for Station KWSM(FM), therefore we need not consider Durant's comments which merely restated its intention to apply for Channel 281C3, if allotted. Husbands filed comments advising the Commission that the Davis Family Trust is presently the proposed assignee of Station KWSM(FM) and has contributed funds for the technical study submitted in support of this proposal. Davis filed comments advising the Commission of the grant of the assignment of license application for Station KWSM(FM) from Harmon G. Husbands, Receiver, to the Davis Family Trust on November 29, 1994, and consummated on February 3, 1995. These comments were not accompanied by a motion to accept. However, since these comments simply confirm Davis' continuing interest in pursuing the modification proposal initiated by Husbands and Durant, no prejudice will ensue from their acceptance.

[3] The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service, and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3)]. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

[4] Population figures are from the 1990 U.S. Census.

[5] We note that the Denison-Sherman Urbanized Area will continue to receive aural services from five local commercial AM and FM stations. Stations KDSQ(FM) and KDSX(AM) are licensed to Denison-Sherman.

[6] The coordinates for Channel 281C3 at Sanger are North Latitude 33-25-10 and West Longitude 97-15-28.

KWSM(FM), IS MODIFIED to specify operation on Channel 281C3 at Sanger, Texas, in lieu of Channel 281A at Sherman, Texas, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Davis Family Trust, licensee of Station KWSM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-15

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Pago Pago, American Samoa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 12, 1995; Released: June 19, 1995

By the Chief, Allocations Branch:

1. At the request of Oceania Broadcasting Network, Inc., ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 981 (1995), proposing the allotment of Channel 226C1 to Pago Pago, American Samoa, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 226C1 to Pago Pago since an interest has been expressed in providing the community with an additional local FM transmission service. Channel 226C1 can be allotted to Pago Pago in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Pago Pago, American Samoa	221C3, 226C1

4. The window period for filing applications will open on **August 3, 1995**, and close on **September 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 226C1 at Pago Pago are -14-16-41 South Latitude and 170-42-09 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-111

In the Matter of

Amendment of Section 73.202(b), RM-8519
Table of Allotments,
FM Broadcast Stations.
(Ingalls, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1995; Released: June 19, 1995

By the Chief, Allocations Branch:

1. At the request of Dana J. Puopolo ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 5317 (1994), proposing the allotment of Channel 290A to Ingalls, Kansas, as the community's first local aural transmission service. Petitioner filed comments restating his interest to apply for Channel 290A, if allotted.[1]

2. In the *Notice*, petitioner was requested to furnish sufficient information to support a finding that Ingalls is a community for allotment purposes. In response, petitioner states that according to U.S. Census Bureau, the Kansas Secretary of State office, and the League of Kansas Municipalities, Ingalls is an incorporated community. Further, petitioner points out that the community has its own post office, fire department, community ambulance service, city school system and city clerk.

3. Based on the record before us, we find that the information provided has shown that Ingalls is a community for allotment purposes. In addition, we have confirmed with state authorities that Ingalls has elected Mayor/city council form of government and is surrounded by a large agricultural area and cattle feed lot industry. While Ingalls only has a population of 301 persons, it provides municipal services to the community, including water, sewage and garbage collection. The administrative office of the unified school district for 6 schools is located in Ingalls, as well as Ingalls Cafe and Ingalls Gasoline.

4. We believe that the public interest would be served by allotting Channel 290A to Ingalls since it could provide the community with its first local aural transmission service. Channel 290A can be allotted to Ingalls in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 3, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ingalls, Kansas	290A

6. The window period for filing applications will open on **August 3, 1995**, and close on **September 5, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner failed to include an affidavit verifying his statements, therefore petitioner was requested to comply with the requirements of Section 1.52 of the Commission's Rules. In response, petitioner submitted a statement, thus, his initial failure to fulfill all subscription and verification requirements has been remedied.

[2] The coordinates for Channel 290A at Ingalls are North Latitude 37-49-48 and West Longitude 100-27-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-85

In the Matter of

Amendment of Section 73.202(b), RM-8518
Table of Allotments,
FM Broadcast Stations.
(Copeland, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1995; Released: June 19, 1995

Comment Date: August 10, 1995
Reply Comment Date: August 25, 1995

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Greater Plains Christian Radio, Inc. ("petitioner"), requesting the allotment of Channel 280C1 to Copeland, Kansas, as the community's third local FM service. Petitioner also requests that the Commission reserve Channel 280C1 for noncommercial use. Petitioner states it will apply for Channel 280C1, if allotted.[1]

2. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions to this policy have been made where channels in the noncommercial band are not available because of foreign (Canadian or Mexican) allotments or potential interference to operation on VHF Television Channel 6.[2] In this instance, potential interference to KBSD-TV, Ensign, Kansas, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use.

3. We believe petitioner's proposal warrants consideration since it could provide Copeland with an additional FM service. We request comments on the allotment of Channel *280C1 to Copeland, Kansas, and the reservation of the channel for noncommercial educational use. Channel *280C1 can be allotted to Copeland in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments. Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Copeland, Kansas	251C1, 256C1	251C, 256C1, *280C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 10, 1995**, and reply comments on or before **August 25, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Stephen C. Simpson
1090 Vermont Avenue, N.W.
Suite 800
Washington, D.C. 20005
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a

[1] The Commission's local ownership rules provide that for stations in markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. *See* 47 C.F.R. Section 73.3555(a)(1)(i). Since Copeland, Kansas, has only two FM stations allotted to the community, with petitioner being the licensee of one of the stations, petitioner is requested to provide information showing it is eligible to acquire a second station at Copeland in its comments.

[2] *See Comobabi, Arizona*, 47 Fed. Reg. 32717, published July 29, 1982, and *Burlington and Newport, Vermont*, 45 R.R. 2d 786 (1979).

[3] The coordinates for Channel *280C1 at Copeland are North Latitude 37-32-31 and West Longitude 100-37-45.

request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-86

In the Matter of

Amendment of Section 73.202(b), RM-8636
Table of Allotments,
FM Broadcast Stations.
(Frankenmuth, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1995; Released: June 19, 1995

Comment Date: August 10, 1995
Reply Comment Date: August 25, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Frankenmuth Broadcasting, Inc. ("petitioner"), seeking the allotment of Channel 229A to Frankenmuth, Michigan, as that community's first local FM broadcast service. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local FM service to Frankenmuth, Michigan. Channel 229A can be allotted to Frankenmuth consistent with the Commission's Rules provided there is a site restriction 14.9 kilometers (9.3 miles) southeast of the community.[1] The site restriction will prevent a short spacing to Station WBCT, Channel 229B, Grand Rapids, Michigan, and Station CKLW-FM, Channel 230C1, Windsor, Ontario, Canada. Since Frankenmuth is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the fact that the proposed allotment would provide a firt local FM service to Frankenmuth, the Commission believes it would serve the public interest to solicit comments to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Frankenmuth, Michigan	---	229A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 10, 1995**, and reply comments on or before **August 25, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Harry C. Martin
Andrew S. Kersting
Reddy, Begley, Martin & McCormick
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] The coordinates for Channel 229A at Frankenmuth are 43-18-21 and 83-33-28.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-89

In the Matter of

Amendment of Section 73.202(b), RM-8639
Table of Allotments,
FM Broadcast Stations.
(Healdsburg, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1995; Released: June 19, 1995

Comment Date: August 10, 1995
Reply Comment Date: August 25, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Phil Squyres ("petitioner") requesting the allotment of Channel 244A to Healdsburg, California, as that community's third local FM service. Petitioner stated his intention to apply for Channel 244A if it is allotted to Healdsburg, as requested.

2. A staff review of the proposal reveals that Channel 244A can be allotted to Healdsburg in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 13.9 kilometers (8.6 miles) north of the community at coordinates 38-43-53 and 122-49-07. The site restriction is required to avoid a short-spacing to the licensed site of Station KOIT-FM, Channel 243B, San Francisco, California, at coordinates 37-45-20 and 122-27-05.

3. Based upon the interest expressed in providing an additional local FM service to Healdsburg, California, we will propose to allot Channel 244A to that community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Healdsburg, California, as follows:

	Channel No.	
City	Present	Proposed
Healdsburg, California	225B, 240A	225B, 240A, 244A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 10, 1995**, and reply comments on or before **August 25, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Peter Gutmann, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, NW Suite 200
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of

the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-88

In the Matter of

Amendment of Section 73.202(b), RM-8641
Table of Allotments,
FM Broadcast Stations.
(Rose Hill and Trenton, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1995; Released: June 19, 1995

Comment Date: August 10, 1995
Reply Comment Date: August 25, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Duplin County Broadcasters ("petitioner) requesting the substitution of Channel 284C2 for Channel 284A at Rose Hill, North Carolina, the reallotment of Channel 284C2 to Trenton, North Carolina, and the modification of Station WBSY's license to specify Trenton as its community of license.[1] Duplin states that it will promptly apply for the channel, if reallotted to Trenton.

2. Petitioner seeks modification of Station WBSY's license pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. Petitioner contends that adoption of the proposal will result in a preferential arrangement of allotments by providing Trenton with its first local aural transmission service without depriving Rose Hill of its sole local aural broadcast service since it will continue to receive local service from daytime-only AM Station WEGG. In support of the proposal, it states that Trenton is the seat of Jones County, with a population of 284 persons.[2] Further, petitioner states that Jones County, with a population of 9,414 persons, has no aural broadcast service licensed to any community within the county. While Rose Hill is more populous, with a population of 1,287 persons, and its county, Duplin, has a population of 39,995 persons, petitioner submits that the substitution of channels and change of community will enable Station WBSY to increase the number of persons it serves with a 60 dBu signal from its present 36,354 persons to 336,401 persons, and to increase the area it serves from 1,879 square kilometers to 8,3245 square kilometers. Finally, petitioner states that Trenton is not located in or near any urbanized area.

3. We believe petitioner's proposal warrants consideration since the substitution of Channel 284C2 for Channel 284A and the reallotment of the channel from Rose Hill to Trenton, could provide the latter community with its first local aural transmission service and enable Station WBSY to improve its facilities and thus serve a larger area. However, since petitioner proposes to relocate its transmitter site to accommodate its proposal, it may result in areas that will lose existing reception service. Therefore, although petitioner has provided information in its proposal concerning the areas and populations which will receive a new service, it is requested to also provide information concerning the areas and populations which will lose existing service if Channel 284C2 is allotted to Trenton. The study should also show the total reception service that is now available within both the gain and loss areas.

Technical Analysis

4. Channel 284C2 can be allotted to Trenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.4 kilometers (0.9 miles) west to accommodate petitioner's desired transmitter site.[3] We note that the allotment of Channel 284C2 to Trenton is short-spaced to the present operation of Station WMSQ, Havelock, NC, on Channel 285A. However, pursuant to MM Docket 86-65, Station WMSQ has been ordered to modify its operation to specify Channel 286C2 and the Channel 284C2 allotment at Trenton does comply with the mileage separation requirements to the reference coordinates forChannel 286C2 at Havelock.[4] *See* 2 FCC Rcd 3319 (1987). Therefore, should this proposal ultimately be adopted, final licensing of Station WBSY may be contingent upon the licensing of Station WMSQ on Channel 286C2 instead of its present Channel 285A.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rose Hill, North Carolina	284A	—
Trenton, North Carolina	—	284C2

[1] Pending before the Commission is an application to assign the license of Station WBSY to RMB Broadcasting, Inc. ("RMB") (File No. BALH-950323GH). Petitioner states that this petition is being filed at this time by the licensee/assignor with the understanding that RMB will continue to prosecute the petition following consummation of the assignment of license.

[2] Population figures are taken from the 1990 U.S. Census, unless otherwise indicated.

[3] The coordinates for Channel 284C2 at Trenton are North Latitude 35-04-00 and West Longitude 77-22-00.

[4] The proposed allotment of Channel 284C2 to Trenton also complies with the mileage separation requirements with respect to the application of Station WMSQ (BPH-941019IC).

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 10, 1995**, and reply comments on or before **August 25, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Gutmann, Esq.
Pepper & Corazzini, L.L.P.
1776 K Street, NW, Suite 200
Washington, D.C. 20006
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEPORT TRANSMISSION COMPANY — File No. I-T-C-95-190

Application for authority to acquire and operate facilities for service to various overseas points via the Orion F1 satellite.

ORDER AND AUTHORIZATION

Adopted: May 31, 1995; Released: June 19, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity will be served by a grant thereof.

2. Accordingly, IT IS ORDERED that applicationed File No. I-T-C-95-190 IS GRANTED, and Teleport Transmission Company[1] (TTC) is authorized to:

a. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in the Appendix hereto, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in the Appendix hereto, furnished by its correspondents;

b. lease and operate any necessary domestic connecting facilities;

c. lease a one-half interest in and operate any necessary overseas connecting facilities; and

d. use the facilities authorized herein to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendix.

3. IT IS FURTHER ORDERED that neither TTC nor any persons or companies directly or indirectly controlling or controlled by TTC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TTC or any persons or companies controlling or controlled by TTC are parties.

4. IT IS FURTHER ORDERED that our authorization of TTC to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendix -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendix or which originate in one of the countries listed in the Appendix and terminate in the United States. In addition, TTC may not -- and TTC's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the Orion F1 satellite.

10. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

11. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

[1] The original application was filed by Holmdel Telecommunications Group, Inc. (HTG). Thereafter, all of the Section 214 certificates of HTG were transferred to Teleport Transmission Company by the Commission's Memorandum Opinion, Order and Authorization released May 10, 1995, DA-95-1026 (File No. I-T-C-95-163(AL)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX

COUNTRIES TO BE SERVED VIA ORION F1 SATELLITE

Up to ten 64-kbps voice-grade circuits and one video circuit to each of the following points, not interconnected with the public switched network:

Austria	Italy
Belgium	Luxembourg
Denmark	Norway
France	Netherlands
Germany	Poland
Greece	Sweden
Ireland	United Kingdom

Up to six 64-kbps voice-grade circuits to each of the following points, interconnected with the public switched network:

Austria	Netherlands
Germany	Norway
Greece	Poland
Hungary	Sweden
Ireland	

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC & EASTERN DIGITAL TRANSMISSION SERVICES, INC. File No. I-T-C-95-207

Application for authority to acquire and operate facilities for service via the ANIK and SOLIDARIDAD satellite systems.

ORDER AND AUTHORIZATION

Adopted: May 31, 1995; Released: June 19, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a partial grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-207 IS GRANTED IN PART, and Pacific & Eastern Digital Transmission Services, Inc. (PEDTS) is authorized to:

a. establish channels of communication between appropriateiy authorized U.S. earth stations and ANIK E1 and E2 satellites for provision of authorized transborder services between the United States and Canada;

b. establish channels of communication between appropriately licensed U.S. earth stations and SOLIDARIDAD I and II satellites for provision of authorized transborder services between the United States and Mexico; and

c. lease and operate any necessary domestic connecting facilities.

3. IT IS FURTHER ORDERED that neither PEDTS nor any persons or companies directly or indirectly controlling or controlled by PEDTS, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which PEDTS or any persons or companies controlling or controlled by PEDTS are parties.

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

8. IT IS FURTHER ORDERED that action on PEDTS' request for authority to acquire ANIK and SOLIDARIDAD circuits to countries in addition to Canada and Mexico is hereby deferred pending action on the Commission's Notice of Proposed Rulemaking in *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, IB Docket No. 95-41, FCC 95-146, released April 25, 1995.

9. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TECHNOLOGY VENTURES INTERNATIONAL, INC., Assignor,

and

MASTEC TELEPORT, INC., Assignee.

File No. I-T-C-95-249(AL)

Application for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to assign Section 214 authorization.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 31, 1995; Released: June 19, 1995

By the Chief, Telecommunications Division:

1. Technology Ventures International, Inc. (TVII) and MasTec Teleport, Inc. (MTI), pursuant to Section 214 of the Communications Act of 1934, as amended, submitted the above-captioned application requesting authority to assign TVII's Section 214 certificate to MTI.[1] The application was placed on public notice and no comments were received.

2. Both of the applicants are Florida corporations. VTII is a certified international communications carrier, pursuant to its referenced Section 214 certificate. MTI will become such a carrier upon grant of the instant application. MTI is owned by a Delaware corporation, MasTec, Inc., and a Florida corporation, Satellite Ventures International, Inc.

3. The applicants state that MTI will continue to provide the services authorized under the Section 214 certificate to be assigned with no changes in the applicable terms and conditions described in the authorization. Thus, there will be no discontinuation of service to the public.

4. In view of the foregoing, we conclude that consent to assignment of TVII's Section B 214 certificate to MTI will serve the public interest, convenience and necessity.

5. Accordingly, IT IS ORDERED that the application of Technology Ventures International, Inc. and MasTec Teleport, Inc., File No. I-T-C-95-249(AL) IS GRANTED, and we consent to the assignment from TVII to MTI of TVII's Section 214 certificate.

6. IT IS FURTHER ORDERED that all terms and conditions of any Commission orders granting authority to TVII to provide common carrier services are now applicable to MTI.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that MTI must continue to maintain tariffs for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] *See Order, Authorization and Certificate*, DA-94-1238, released November 18, 1994 (File No. I-T-C-94-421).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP.

Application for authority to acquire and operate capacity in the UGARIT Cable System between Syria and Cyprus.	File No. I-T-C-95-270
Application for authority to acquire and operate capacity in the CADMOS Cable System between Lebanon and Cyprus.	File No. I-T-C-95-271

ORDER AND AUTHORIZATION

Adopted: June 5, 1995; Released: June 19, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-270 and I-T-C-95-271 ARE GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. acquire on an ownership basis a one-half interest in and operate 30 MAUOs[1] of capacity in the UGARIT Cable System between Syria and Cyprus;

b. acquire on an ownership basis a one-half interest in and operate 60 MAUOs of capacity in the CADMOS Cable System between Lebanon and Cyprus;

c. acquire by lease, or other comparable means, a one-half interest in and operate necessary overseas connecting facilities; and

d. activate and operate the facilities in a and c, above, to provide AT&T's regularly authorized services between the United States and Syria; and

e. activate and operate the facilities in b and c, above, to provide AT&T's regularly authorized services between the United States and Lebanon.

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MAs for the UGARIT and CADMOS Cable Systems, as well as any Commission Order granting authority to acquire and operate facilities in the UGARIT or CADMOS Cable System.

4. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

[1] A MAUO is defined in the UGARIT and CADMOS Cable System Construction and Maintenance Agreements as the minimum practical unit of use, consisting of 64-kbps and an additional 8,533.333 bps for multiplexing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP. File No. I-T-C-95-279

Application to amend blanket authorization to lease and operate satellite voice-grade bearer circuits between the United States and points in Central America, South America, the Caribbean area and Africa during the years 1993-1997.

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

ORDER AND AUTHORIZATION

Adopted: June 12, 1995; Released: June 19, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-268 IS GRANTED, and AT&T's blanket authorization to lease and operate satellite voice-grade circuits via appropriate INTELSAT satellites between the United States and points in Central America, South America, the Caribbean area and Africa for the years 1993-1997 is further amended to add Burundi, Chad, Eritrea, Guinea-Bissau and Namibia as authorized points of communication.[1]

3. All other terms and conditions set forth in AT&T's initial blanket authorization for the years 1993-1997 remain in force.

4. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

[1] AT&T's initial blanket authorization was approved in File No. I-T-C-93-006, 8 FCC Rcd 970 (1993), and was amended in File No. I-T-C-93-123, 8 FCC Rcd 4317 (1993), and further amended in File Nos. I-T-C-93-123, 8 FCC Rcd 8392 (1993); I-T-C-93-123(aa), 9 FCC Rcd 3381 (1994); and I-T-C-93-123(aaa), 10 FCC Rcd 652 (1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STATEN ISLAND CABLE
OF NEW YORK CITY

Appeal of Local Rate Order
of the City of New York, New York
(Staten Island, CUID No. NY1312)

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 1995; Released: April 4, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 31, 1994, Staten Island Cable, the franchisee in the above matter, filed an appeal of a local rate order adopted on September 30, 1994 by its local franchising authority, the City of New York, New York ("the City") for the borough of Staten Island. On November 15, 1994, the City filed an opposition, urging the Commission to reject Staten Island Cable's appeal and to allow the City's rate order to go into effect unchanged. Staten Island Cable filed a reply on November 22, 1994 claiming that the City's interpretation of the Commission's rules was incorrect. In its rate order, the City established permitted rates for the basic service tier and associated equipment and installations and required Staten Island Cable to refund overcharges to subscribers.[1]

2. In its appeal, Staten Island Cable alleges that the City inappropriately based its rate order on the use of updated data on Staten Island Cable's FCC Form 393,[2] which resulted in an improper reduction of Staten Island Cable's basic service tier rate.[3] Staten Island Cable argues that the Commission's rules, which limit a regulatory authority's ability to update or "refresh" data on an operator's rate filing, prevent the City from ordering refunds based solely on the substitution of updated data. Staten Island Cable argues, in the alternative, that it should at least be permitted to reduce its refund liability by offsetting undercharges for rates it charged for its cable programming services ("CPS") tier.

3. In response, the City argues that Staten Island Cable's Form 393 was based on data that was not current as of the initial date of regulation, as required by our rules, and, therefore, the City was justified in making revisions to Staten Island Cable's rate filing. The City disputes Staten Island Cable's interpretation of the Commission's "refreshing" policy. The City also argues that there is no basis under the 1992 Cable Act or the Commission's rules to allow Staten Island Cable to offset the refunds ordered by the City for the basic tier with alleged undercharges of its CPS tier rates.

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if we determine that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

II. DISCUSSION

5. On September 1, 1993, the Commission's rate regulations implementing the 1992 Cable Act became effective. On this date, Staten Island Cable restructured its rates in an effort to comply with those rules. At that time, Staten Island Cable offered a 29-channel basic service tier for $10.45, and a 23-channel CPS tier for $8.29. Subsequently, on October 1, 1993, pursuant to the terms of a then recently-negotiated retransmission consent agreement, Staten Island Cable added a new service, ESPN-2, to its CPS tier, increasing the number of offerings on this tier to 24 channels and, therefore, increasing the total number of regulated offerings, including both the basic service and CPS tiers, to 54 channels from the previous 53 channels. However, Staten Island Cable made no rate adjustment to

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] The Commission's Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") directs a cable operator to determine its maximum permitted rates for regulated service, equipment, and installations.

[3] Staten Island Cable added a single channel to its cable programming service ("CPS") tier prior to its initial date of regulation, but after it restructured its rates on September 1, 1993, pursuant to the Commission's rules. The City recalculated Staten Island Cable's basic service tier rates based on the new channel lineup, which resulted in a slightly lower maximum permitted per-channel rate and, therefore, a lower overall rate for the basic service tier. The City's rate order requires Staten Island Cable to issue refunds to subscribers based on the difference between the rate that Staten Island Cable established using the old channel lineup and the rate calculated by the City based on the new channel lineup.

[4] 47 C.F.R. § 76.944.

[5] *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

account for this new additional channel, leaving intact the rates it had initially set for its basic service tier and its CPS tier on September 1, 1993.

6. On October 15, 1993, the City filed with the Commission its certification to regulate rates and notified Staten Island Cable that it had 30 days to submit its rate filing, in accordance with our rules.[8] On November 15, 1993, Staten Island Cable, justifying its rates using the benchmark methodology, submitted to the City a FCC Form 393, which relied on the same data that it used to restructure its rates on September 1, 1993. Staten Island Cable had adjusted neither its basic service tier rate nor its CPS tier rate to account for the channel it added in October. In the City's rate order, it adjusted Staten Island Cable's rate to account for the added channel and found that its permitted basic service tier rate should be reduced from $10.45 to $10.27, solely because the increase in the total number of channels resulted in a reduced permitted per-channel rate. Because CPS tier rates are regulated by the Commission, not local franchising authorities, the City's rate order did not address Staten Island Cable's CPS tier rate. Staten Island Cable claims that the rates that it established on September 1, 1993 were based on a channel line-up that was accurate at the time of its restructuring and, therefore, the City should have approved them.

7. The issue here is whether Staten Island Cable should have reduced its basic service rate when it submitted its rate filing to the City to account for the channel added in October. Under the benchmark regulations, an operator's per-channel rate, as derived by Form 393, is determined by a formula that includes as variables the number of subscribers served by the system, the number of regulated channels offered, and the number of satellite channels offered on regulated tiers.[9] Therefore, an adjustment in the total number of channels available on regulated service tiers would have an impact on an operator's permitted per-channel rate for each regulated service tier.

8. The Commission's rules generally require an operator to measure its maximum permitted rates from data that is current as of the initial date of regulation.[10] With respect to the basic service tier, the initial date of regulation is the date on which the franchising authority certifies to regulate rates.[11] Therefore, the number of channels that Staten Island Cable offered on October 15, 1993, not September 1, 1993, would ordinarily be used to determine Staten Island Cable's maximum permitted rates because October 15th was the initial date of regulation. However, the Commission has created an exception to this general rule.[12]

9. In the *Third Recon. Order*, the Commission addressed the issue of updating rate calculations due to changes in data that are material to determining an operator's permitted rates, after an operator has already restructured its rates in accordance with the Commission's rules.[13] In the *Third Recon. Order*, the Commission stated that "[o]perators should not be penalized for making good faith attempts to comply with our rules in a timely manner."[14] The Commission was concerned that operators, who attempted to comply with the Commission's rules when they became effective and who set their rates based on data that was current at the time of their restructuring, could see their rates become unreasonable solely due to replacing that data with data that became subsequently available.[15] The Commission determined that if an operator was required to immediately adjust its rates in accordance with the new data, operators would face significant administrative expenses and subscribers would be confused by another adjustment in their rates.[16] However, the Commission was also cognizant of the need for regulatory authorities to accurately verify the reasonableness of an operator's rates and to ensure that any inaccuracies were not compounded in future rate increases or adjustments.[17] In order to balance these concerns, the Commission determined that an operator's rates that are justified by using data that was available at the time of an operator's rate restructuring should not be required to adjust its rates to reflect current data.[18] If its rates are not justified by using that data, an operator would be required to adjust its rates using data that was current as of the initial date of regulation.[19]

10. We agree with Staten Island Cable and find that the City should have reviewed Staten Island Cable's rates using the data that was available at the time Staten Island Cable initially restructured its rates (*i.e.*, old data).[20] Staten Island Cable restructured its rates in accordance with the Commission's rules on September 1, 1993. Staten Island Cable added a single channel subsequent to its initial restructuring on October 1, 1993. The initial date of regulation for its rates for the basic service tier and associated equipment and installations was October 15, 1993. However, the *Third Recon. Order* specifically mentions the addition of channels as an example of the type of information that may have changed between the time operators initially set their rates and the time those rates were reviewed by a

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[8] 47 C.F.R. § 76.930.

[9] *Rate Order*, 8 FCC Rcd at 5768.

[10] 47 C.F.R. § 76.922(b)(1)(ii) (superseded); Form 393, Worksheet 1 -- "Calculation of Rates in Effect on Initial Date of Regulation and Benchmark Comparison."

[11] 47 C.F.R. § 76.922(b)(7) (formerly 47 C.F.R. § 76.922(b)(2)).

[12] *See Third Recon. Order*, 9 FCC Rcd at 4349-4350; 47 C.F.R. § 76.922(b)(9).

[13] *Third Recon. Order*, 9 FCC Rcd at 4349-4350.

[14] *Third Recon. Order*, 9 FCC Rcd at 4349.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Third Recon. Order*, 9 FCC Rcd at 4349-4350.

[19] *Id.* ("Accordingly, we will require the following actions when different rates are dictated by data used in initial rate-setting than by data current as of the time an FCC Form 393 (and/or FCC Forms 1200/1205) is actually submitted to the franchising authority or the Commission. When current rates are accurately justified by analysis using the old data (and that data was accurate at the time), cable operators will not be required to change their rates. In these circumstances, however, when such operators make any subsequent changes in their rates (such as when seeking their annual inflation increase), those changes must be made from rates levels derived from the updated information. When current rates are *not* justified by analysis using the old data (so that a rate adjustment would be necessary in any event), cable operators will be required to correct their rates pursuant to current data. In these circumstances, the resulting rates must be based on current data.")

[20] Because we agree with Staten Island Cable that the City should not have ordered any subscriber refunds, we need not

regulatory authority.[21] Under the terms of the exception described above, because the permitted per-channel rate that Staten Island Cable calculated in its initial attempt to restructure its rates was based on data available at the time of restructuring and because the City did not find that Staten Island Cable's rates were not justified using this old data, Staten Island Cable should be permitted to use its September 1, 1993 benchmark calculations to justify its rates in its November 15, 1993 rate filing with the City.[22] We will remand this matter to the City so that it can enter a ruling consistent with the terms of this Order.[23]

III. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that Staten Island Cable's appeal of New York City's rate order regarding the City's use of updated data to justify subscriber refunds IS REMANDED to the City for resolution in accordance with the terms of this Order.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

address the issue of Staten Island Cable's offsetting its refund liability from the basic tier overcharges with undercharges from the CPS tier.

[21] *Third Recon. Order*, 9 FCC Rcd at 4349. ("For example, tentative inflation adjustments have since become definite, equipment costs may have varied, or channels may have been added.")

[22] *See Third Recon. Order*, 9 FCC Rcd at 4349-4350; 47 C.F.R. § 76.922(b)(9). However, any subsequent changes in Staten Island Cable's rates, such as when seeking an annual inflation adjustment or adjusting for changes in external costs, must reflect rate levels based on the updated data, not the old data. *Id.* In this case, Staten Island Cable would be required to account for the channel addition when filing its Form 1200 to set its rates under the Commission's revised the rate rules.

[23] The City also argues that Staten Island Cable knew when it initially restructured its rates in September, 1993 that it would be adding a channel in the near future and therefore, it should have accounted for this change when it set its rates. Staten Island Cable established its rates on September 1, 1993 based on its then-current channel line-up, in conformity with our rules. Our rules do not require an operator to set its initial rates based on anticipated adjustments to its channel line-up.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PARAGON CABLE TELEVISION

Motion to Withdraw
Appeal of Local Rate Order and
Request for Emergency Stay for the
Cities of Fountain Valley, Huntington
Beach, Stanton and West Minister,
California

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

ORDER

Adopted: March 31, 1995; Released: April 4, 1995

By the Chief, Cable Services Bureau:

1. On June 9, 1994, Paragon Cable ("Paragon") filed an appeal of the local rate order, adopted May 10, 1994 by the Public Cable Television Authority ("PCTA") regulating basic service and equipment rates in the above-captioned communities.[1] In the local rate order, the PCTA established regulated rates for basic cable service and associated equipment, provided by Paragon, as allowed by the Cable Television Consumer Protection and Competition Act of 1992. The local order required Paragon to reduce the rates charged for basic cable service and equipment.

2. On July 13, 1994, Paragon filed with the Commission a motion to withdraw its earlier-filed appeal and stay request.[2] In its motion, Paragon explained that an appeal and stay are no longer necessary because the PCTA issued "a revised rate ordinance, which remedied some of the problems previously identified by Paragon."[3] There being no opposition, Paragon's Motion to Withdraw is granted.

3. Accordingly, IT IS ORDERED THAT Paragon Cable's Motion to withdraw appeal and stay of the Local Rate Order for the Cities of Fountain Valley, Huntington Beach, Stanton and West Minister, California IS GRANTED. IT IS FURTHER ORDERED THAT Paragon Cable's appeal of the local rate order IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

[1] In addition to the appeal of Fountain Valley, Huntington Beach, Stanton and West Minister's rate order, Paragon also filed a "Request for Emergency Stay."

[2] Paragon entitled its pleading as "Withdrawal of Appeal and Request for Emergency Stay." We will treat the pleading as a motion by Paragon to withdraw its appeal and stay request.

[3] *See* Withdrawal of Appeal and Request for Emergency Stay, dated July 13, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries Corporation

Appeal from a Rate Order of
the City of Bishopville, South Carolina

ORDER

Adopted: April 3, 1995; Released: April 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On July 5, 1994, Cablevision Industries Corporation ("CVI") filed with the Commission an appeal from a rate order ("Appeal") adopted by the City of Bishopville, South Carolina ("the City").[1] In its local order, the City established CVI's rates for basic cable service, equipment, installations and hourly service charges.[2] The City ordered CVI to refund or credit subscribers for all payments made in excess of the rates set forth in the local order for the period beginning September 1, 1993.[3]

2. In its appeal, CVI challenges the City's rate order with respect to two issues.[4] CVI asserts that the City improperly ordered the operator to refund all charges designated as an "FCC Mandated Adjustment." CVI further argues that the City did not have the authority to review CVI's late payment charges. The City argues that the "FCC Mandated Adjustment" should be disallowed because CVI did not comply with the Commission's rules and regulations regarding the timing of the adjustment. The City also contends that late fees charged by the operator should be disallowed under the customer service standards of the 1992 Cable Act.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

II. DISCUSSION

A. Billing Adjustments

4. When the Commission adopted rate regulations, pursuant to the 1992 Cable Act, it initially selected June 21, 1993 as the effective date. However, on June 18, 1993, the implementation date was changed to October 1, 1993 to provide the Commission an opportunity to obtain a supplemental appropriation and to allow cable operators and local authorities additional time to implement rate regulation.[9] Subsequently, the Commission obtained the needed appropriation, and on July 27, 1993, the effective date of regulation was moved up to September 1, 1993.[10] Accordingly, by September 1, 1993, cable operators were required to restructure their rates and make revisions to service offerings that were necessary to be in compliance with our rules.[11] When the Commission moved the effective date of regulation to September 1, 1993, it recognized that, due to centralized billing practices, some cable operators would not be able to begin billing subscribers for new, restructured rates by September 1, 1993. Therefore, in order to have the restructured rates of such operators deemed to be "in effect" as of September 1, 1993, the

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[1] CVI also filed a request for stay on July 5, 1994. Because we are resolving this dispute on the merits raised in the appeal, the petition for stay is rendered moot. In the City's opposition, filed on July 25, 1994, the City argues that CVI's appeal should be dismissed as untimely. Our review, however, reveals that the operator filed its appeal and stay request within the time limits provided by 47 C.F.R. § 76.944(b). The City issued its rate order on June 2, 1994. Since the last day of CVI's time period fell on Saturday, July 2, 1994, CVI had until Tuesday, July 5, 1994 to file its appeal. *See* 47 C.F.R. §§ 1.4 (c) and (j). CVI has not filed a Reply.

[2] *See* Appeal, Exhibit G, Resolution to Regulate Basic Television Cable Rates, City of Bishopville, South Carolina, dated June 2, 1994.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] The City, in its Opposition, requests that the Commission issue a ruling regarding the City's disallowance of CVI's channel adjustment factor. *Opposition* at 5, 13. The City argues that CVI has not made any alterations in its channel lineup to justify the application of the channel adjustment factor and asserts that the changes to the lineup to form CVI's a la carte packages were made solely for the purpose of rate evasion. *Id* at 5. CVI did not ask the Commission to rule on the City's treatment of the operator's channel adjustment factor and in fact, specifically requested that the Commission not address this matter on appeal given the relatively modest sums involved. *Appeal* at n.1. Our rules do not provide for a local franchising authority to seek confirmation of issues addressed in its own ratemaking decision in an appeal of that decision by an operator which does not raise those issues. *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5728-5732 (1993) (*"Rate Order"*). Accordingly, we deny the City's request that we address the issue of the channel adjustment factor.

[5] *See* 47 C.F.R. § 76.944.

[6] *See Rate Order*, 8 FCC Rcd at 5731; Third Order on Reconsideration in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (released March 30, 1994) (*"Third Reconsideration Order"*).

[7] *Id.*

[8] *Id.*

[9] *See Deferral Order*, 58 Fed. Reg. 29737 (1993).

[10] *See Order*, 58 Fed. Reg. 41042 (1993).

[11] 47 C.F.R. §§ 76.922 and 76.923.

Commission allowed those operators to begin billing the restructured rates as soon as practically possible after September 1, 1993, but no later than October 1, 1993.[12] The Commission directed those operators that could not begin billing the restructured rates by September 1, 1993 to make a one-time correction on a subsequent bill to adjust for any subscriber overcharges or undercharges, which were to be calculated as the difference between the billed rate and the restructured rate. This one-time adjustment would place subscribers in the same position as if they had been paying the restructured rates since September 1, 1993. We stated that this adjustment must be implemented in a reasonable manner, but did not specify a time period.

5. CVI contends that when the Commission changed the effective date of rate regulation from October 1, 1993 to September 1, 1993, CVI was unable to meet the new deadline. However, CVI apparently did bill subscribers in accordance with its restructured rates prior to October 1, 1993. Subsequently, CVI added the authorized adjustments to subscribers' bills to reflect refunds of overcharges and surcharges of undercharges. The record does not reflect the date or dates on which CVI billed the adjustments. The City argues that the adjustments should be disallowed in this case because it asserts that CVI waited until its December, 1993 billing to implement the adjustments.

6. The City asserts that CVI billed these adjustments two months after CVI implemented its restructured rate schedule. Although the Commission did not specify a deadline by which operators must actually make the adjustments, the City construed the Commission's order to require CVI to bill the adjustments, as well as the restructured rates, by October 1, 1993. This is not the case. The Commission did not specify a time period in which the adjustments had to be made. CVI had to restructure its rates and begin billing the correct rates by October 1, 1993. Subscribers ultimately paid what they would have paid had CVI been able to fully implement its restructured rates prior to September 1, 1993. We find that CVI complied with the time limits set forth in our order. We are not presented with anything in the record which causes us to conclude that CVI's handling of the adjustments was inappropriate. We remand this issue to the City so that it can enter a ruling consistent with these findings.

B. Late payment fees

7. The City states that due to CVI's practice of billing subscribers in advance of the service period, subscribers who do not pay their bills before the end of the time allotted by CVI for them to do so could be assessed late payment fees prior to the receipt of all of the service for which they had been billed.[13] The City ordered CVI to cease assessing late fees in those situations. CVI asserts that it advised the City that late payment fees are not subject to regulation under the 1992 Cable Act. CVI requests that the Commission instruct the City that it may not prohibit or otherwise regulate CVI's late payment charges and related billing practices. It further contends that the issue is moot because it has voluntarily agreed to modify its billing methods so that a subscriber is not obligated to pay a late charge until the completion of the service period for which the initial bill was imposed. The City does not contest the fact that late fees are not specifically referred to under the 1992 Cable Act or Commission regulations, but argues that the fees can be disallowed by the Commission under the customer service standards of the 1992 Cable Act. Additionally, the City rejects the operator's claim that the issue is moot. The City further asserts that CVI's proposal is an abusive billing practice as defined by Section 623 of the Communications Act of 1934.

8. We have previously stated that late payment fees are not subject to regulation under the 1992 Cable Act.[14] Subsequently we revisited the issue and clarified that the regulation of late fees is within the purview of local franchising authorities.[15] Accordingly, we will not rule on the reasonableness of the City's decision to prohibit CVI's late fees. We deny CVI's appeal with respect to this issue.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that Cablevision Industries Corporation's appeal of the rate order adopted by the City of Bishopville, South Carolina regarding the issue of CVI's bill adjustment is REMANDED to the City so that it can enter a ruling consistent with these findings.

10. IT IS FURTHER ORDERED that Cablevision Industries Corporation's appeal of the rate order adopted by the City of Bishopville, South Carolina regarding the issue of CVI's late payment charges and related billing practices is DENIED for the reasons set forth in this Order.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] *See Order*, 58 Fed. Reg. 41042, 44 (1993).

[13] *See* Opposition at 12. Based on the pleadings, we cannot discern how far in advance of the receipt of services CVI billed its subscribers.

[14] *Public Notice*, Cable Television Rate Regulation Questions and Answers No. 13 (released May 7, 1993).

[15] *Public Notice*, The FCC's Revised Cable Rate Rules: Answers to Consumers' Questions, No. 7 (released April 11, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CROWN MEDIA, INC.
d/b/a CROWN CABLE

Appeal of Local	Ashland, CT	Lebanon, CT
Rate Order	Brooklyn, CT	Mansfield, CT
(Docket No. 93-12-09) of	Canterbury, CT	Pomfret, CT
the State of Connecticut	Chaplin, CT	Scotland, CT
Department of Public	Columbia, CT	Thompson, CT
Utility Control; and	Coventry, CT	Willington, CT
	Eastford, CT	Windham, CT
	Hampton, CT	Woodstock, CT

Appeal of Local	Bethlehem, CT	Newtown, CT
Rate Order	Bridgewater, CT	Roxbury, CT
(Docket No. 93-12-10) of	Brookfield, CT	Sherman, CT
the State of Connecticut	Kent, CT	Southbury, CT
Department of Public	Monroe, CT	Trumbull, CT
Utility Control	New	Washington, CT
	Fairfield, CT	Woodbury, CT
	New Milford, CT	

CONSOLIDATED ORDER

Adopted: April 3, 1995; Released: April 5, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. By this Order, the Commission consolidates and resolves two separate appeals filed by Crown Media, Inc. ("Crown") concerning two separate local cable rate orders issued by the State of Connecticut Department of Public Utility Control ("DPUC").[1] Crown's first appeal was filed on September 26, 1994 and involves the rate order issued by the DPUC on August 24, 1994 in its Docket No. 93-12-09.[2] Crown's second appeal was also filed on September 26, 1994 and involves the rate order issued by the DPUC on August 17, 1994 in its Docket No. 93-12-10.[3] On October 6, 1994, the DPUC filed oppositions to each of Crown's appeals. Crown did not file replies to either of the DPUC's oppositions. We have determined that the proceedings are sufficiently similar to justify the joint resolution in a single consolidated order of all of the issues raised by the parties.[4]

2. In each local rate order, the DPUC approved Crown's maximum permitted rates for the basic service tier, but found that Crown's rates for equipment, hourly service charge and installation were above the maximum permitted rates. The DPUC ordered Crown to reduce its rates for equipment, hourly service charge and installation to no more than the maximum permitted levels. The DPUC also ordered Crown to issue refunds or credits to subscribers for the overcharges levied since September 1, 1993.

3. Crown raises two issues in its appeals. First, Crown challenges the DPUC's decision to reject Crown's valuation of capital costs for equipment and installation. Crown argues that the DPUC inappropriately applied cost-of-service principles in reviewing Crown's rates for equipment and installation.[5] Second, Crown argues that the DPUC's disallowance of Crown's "inventory allocation" is contrary to instructions in FCC Form 393.[6]

4. In response, the DPUC maintains that it applied the Commission's benchmark guidelines in reviewing Crown's rates for basic service and related equipment.[7] The DPUC argues that it adjusted Crown's capital costs for equipment using an asset valuation method commonly referred to as "original cost" in order to comply with the Commission's rule that equipment and installation rates be based on "actual costs."[8] With respect to the inventory allocation disallowance, the DPUC asserts that Crown did not meet its burden of proof in supporting the significant addition to Crown's equipment costs.[9]

II. DISCUSSION

5. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[10] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] The appeal of the order in Docket No. 93-12-09 involves the following communities in Connecticut: Ashland, Brooklyn, Canterbury, Chaplin, Columbia, Coventry, Eastford, Hampton, Lebanon, Mansfield, Pomfret, Scotland, Thompson, Willington, Windham and Woodstock.

[3] The appeal of the order in DPUC Docket No. 93-12-10 involves the following communities Connecticut: Bethlehem, Bridgewater, Brookfield, Kent, Monroe, New Fairfield, New Milford, Newtown, Roxbury, Sherman, Southbury, Trumbull, Washington and Woodbury.

[4] Crown raises the same issues and relies on substantially the same arguments in each appeal. Likewise, the DPUC has filed substantially similar oppositions to both appeals. (For purposes of administrative ease, all citations will be to pleadings submitted with respect to the DPUC order in Docket No. 93-12-10. In addition to the appeals of the two local cable rate orders, Crown separately filed on September 26, 1994 requests for stays of each of the local rate orders. Because we are resolving the disputes on the merits presented in the two appeals, the requests for stay have been rendered moot.

[5] Crown Appeal of Order in DPUC Docket No. 93-12-10, at 7-10 ("Crown Appeal").

[6] Crown Appeal at 10. Crown included the inventory allocation argument in both of its appeals. We note, however, that the DPUC made the inventory disallowance only in the order in Docket No. 93-12-10. *See* DPUC Order in Docket No. 93-12-09, at 8-11; DPUC Order in Docket No. 93-12-10, at 9.

[7] DPUC Opposition at 4-6.

[8] DPUC Opposition at 4.

[9] DPUC Opposition at 6-7.

[10] *See* 47 C.F.R. § 76.944.

franchising authority's decision as long as there is a reasonable basis for that decision.[11] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering the local rate order.[12] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[13]

6. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[14] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

7. The operator's maximum permitted rates are derived by completing Parts II and III of Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[15] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figure to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installations are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations.[16] Under our regulations, the maximum permitted rates are deemed to be reasonable, as required under the 1992 Cable Act.[17]

A. Valuation of Capital Costs

8. As required by Form 393, Crown completed Part III Schedule A (Capital Costs of Service Installation and Maintenance of Equipment) and Schedule C (Capital Costs of Leased Customer Equipment). Both of these schedules require information regarding certain capital costs. Crown provided the required capital cost information using gross book valuations as recorded on Crown's books. In the local rate orders, the DPUC adjusted Crown's reported gross book values in order to reflect instead the original cost of the assets. The DPUC's adjustments reduced Crown's capital costs of service installations and maintenance and of leased customer equipment.[18]

9. On appeal, Crown argues that it was inappropriate for the DPUC to adjust Crown's capital costs to reflect original cost. Crown argues that this action is improper where an operator has elected to justify rates using the benchmark approach. Crown asserts that the DPUC inappropriately relied on the Commission's *Cost Order*,[19] which established rules applicable to cost-of-service proceedings, as authority to support calculating Crown's capital costs based on original cost.[20] Crown maintains that as long as Crown's financial acquisition records reflect the acquired assets at fair market value and those records are maintained in accordance with generally accepted accounting principles, its valuation data should be used by the DPUC in calculating Crown's capital costs for equipment and installation on Schedules A and C.

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[11] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation & Buy-Through Prohibition, Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[12] *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[13] *Id.*

[14] To the extent that an operator has sought to take advantage of the refund deferral period available under the Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 4119, 4183-85 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[15] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[16] To calculate the hourly service charge ("HSC"), an operator adds its annual capital costs plus expenses for equipment necessary for the maintenance of customer equipment and the installation of basic tier service, excluding the capital costs of customer equipment. The operator then divides the total by the total number of person-hours spent in those activities over the past year. The HSC is used as a factor in developing charges for installation and monthly lease of individual pieces of equipment.

[17] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[18] In the order in Docket No. 93-12-09, this amounted to a 17.57 percent reduction; in Docket No. 93-12-10, it amounted to a 24.71 percent reduction. DPUC Order in Docket No. 93-12-09, at 11; DPUC Order in Docket No. 93-12-10, at 9.

[19] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, 9 FCC Rcd 4527 (1994).

[20] Crown Appeal at 8-9. In its rate orders, the DPUC cites to paragraphs 54 through 56 of our *Cost Order* (9 FCC Rcd at 4555-4556). *See* DPUC Order in Docket No. No. 93-12-09, at 11 nn.35-36; DPUC Order in Docket No. 93-12-10, at 8 n.34, 9 nn.35-36.

10. In response, the DPUC maintains that it did not transform the review of Crown's Form 393 from a benchmark proceeding into a cost-of-service proceeding. The DPUC claims that it analyzed Crown's rates for basic service and related equipment under the Commission's guidelines for benchmark proceedings. The DPUC contends that it used original cost data rather than Crown's fair market valuation in order to satisfy the requirement, established by the Section 623(b)(3) of the 1992 Cable Act and by the Commission's rules, that equipment and installation rates be based on "actual cost."[21] The DPUC argues that while the *Cost Order* discusses the advantages of original cost valuation in the context of cost-of-service proceedings, that discussion is also applicable in the benchmark context because rates for regulated equipment and installation are required to be based on actual costs.[22]

11. Pursuant to the 1992 Cable Act, the Commission was required to establish standards and procedures to prevent unreasonable charges for regulated equipment.[23] In doing so, we were to ensure that the rate justification methods we permit operators to use are consistent with the 1992 Cable Act and contain principles that will result in reasonable rates at lower cost for subscribers and with the least administrative burden.[24] The 1992 Cable Act also directs the Commission to establish standards for setting, on the basis of actual cost, the rates for installation and lease of equipment used by subscribers to receive the basic service tier.[25]

12. In establishing a framework for regulating basic service as required under the 1992 Cable Act, the Commission adopted two distinct regulatory methods to allow cable operators to justify the reasonableness of their rates: the benchmark and cost-of-service methods.[26] The benchmark approach serves as the primary regulatory mechanism for setting initial regulated rates and for governing rates on a going forward basis.[27] As a backup, a cable operator may use a cost-of-service approach if it believes that the maximum rate under the benchmark formula would not enable the operator to recover costs that it reasonably incurred.[28] With respect to the rules we established for the benchmark approach, we stated in the *Rate Order:*

> [W]e will require the local franchising authorities to follow the detailed guidelines we now adopt for identifying the costs to be recovered through equipment and installation rates and for calculating those rates. We believe that our guidelines satisfy the statutory requirements, and thus, a local franchising authority's proper use of [the guidelines] to determine reasonable rate levels cannot form the basis of a cable operator's complaint to the Commission.[29]

As part of the guidelines we established for setting rates, we required cable operators electing the benchmark approach to submit FCC Form 393.[30]

13. The general instructions to Form 393, Part III ("Worksheet for Calculating Equipment and Installation Charges") state that the operator "should complete this form using financial data from the company's general ledger and subsidiary records maintained in accordance with generally accepted accounting principles."[31] The instructions to Part III, Schedule A (Annual Capital Costs Associated with Maintenance and Installation of Cable Facilities and Service) direct operators to enter in Column B for the equipment categories in Column A "the gross book value for the categories listed in Column A as of the date you last closed yourbooks."[32] The instructions to Part III, Schedule C (Capital Costs of Customer Equipment) direct operators to enter in Column B "the gross book value of the listed equipment."[33] Crown followed these instructions in completing Schedules A and C, and consequently included as the gross book values information recorded on Crown's general ledger and subsidiary records as of the date it last closed its books.[34]

14. In requiring Crown to report as its gross book values the original cost of the assets, the DPUC disregarded the instructions to Form 393, Part III directing operators to use "financial data from the company's general ledger and subsidiary records maintained in accordance with generally accepted accounting principles" and to use data "as of the date you last closed your books." The DPUC's reliance on the more general statement in the General Instructions to Form 393 that equipment and installation rates must be based on "actual cost" is inappropriate in light of the specific instructions directing the use of the general ledger data. Because the specific instructions to Part III tell operators which information to use, local franchising authorities do not have the authority to further interpret the term "actual cost" as used in the 1992 Cable Act, in our *Rate Order*, and in the general instructions to Form

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[21] DPUC Opposition at 4 (citing Communications Act, § 623(b)(3)).
[22] DPUC Opposition at 4-5.
[23] Communications Act, § 623(b)(5), 47 U.S.C. § 543(b)(5).
[24] *See Rate Order*, 8 FCC Rcd at 5751-5752.
[25] Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).
[26] *See Rate Order*, 8 FCC Rcd at 5751-5752.
[27] *Id.* at 5755.
[28] *Id.*
[29] *Rate Order, 8* FCC Rcd at 5801. *See generally* 47 C.F.R. § 76.923 (guidelines for determining rates for equipment and installation used to receive the basic service tier).
[30] *Rate Order*, 8 FCC Rcd at 5703, 5760 n.501, 5771. For establishing the reasonableness of rates in effect after May 15, 1994, operators choosing the benchmark approach must submit FCC Forms 1200 and 1205.
[31] FCC Form 393, at 27.
[32] FCC Form 393, at 33.
[33] FCC Form 393, at 33.
[34] FCC Form 1205, which is the successor to Part III of Form 393, includes virtually identical instructions as in Form 393. The General Instructions to Form 1205 state that operators "should complete this Form using financial data from the company's general ledger and subsidiary records maintained in accordance with generally accepted accounting principles." FCC Form 1205, at 3. The Instructions for Schedule A" (Capital Costs of Service Installation and Maintenance of Equipment and Plant) direct that for Line B, Gross Book Value, operators enter for each category of equipment and plant listed, the "gross book value as of the date you closed books for the time period covered by the Form." FCC Form 1205, at 7. The Instructions for Schedule C (Capital Costs of Leased Customer Equipment) direct that for Line D, Gross Book Value, operators "enter the gross book value of the listed equipment as of the date you closed books for the time period covered by the filing of this Form." FCC Form 1205, at 12.

393. Form 393 is an integral part of the Commission's guidelines and therefore local franchising authorities are required to follow Form 393's requirements.

B. Inventory Allocation

15. In addition to the original cost adjustment discussed above, the DPUC in Docket No. 93-12-10 made another adjustment top "Crown's reported gross book values of leased customer equipment (in Part II, Schedule C). Specifically, before making the original cost adjustment, the DPUC disallowed from Crown's reported equipment gross book values that portion of the gross book values attributable to what Crown refers to as an "inventory allocation."[35] On Schedule C, Crown had reported the gross book value of converters, remotes and tuners as $3,796,706.[36] However, in a pleading Crown later filed with the DPUC, Crown stated that the fair market value of the converters, remotes and tuners was $2,674,001.[37] In response to a DPUC interrogatory Crown indicated that the additional $1,222,706 included in the cost of leased customer equipment on Schedule C was due to "inventory allocation."[38] The DPUC noted in its Order that Crown explained in its written exceptions to the City's revised draft decision only that the inventory allocation was appropriate because " substantial amounts of equipment are required in inventory to provide continued service to existing customers' while the system is undergoing a significant rebuild/upgrade."[39] The DPUC stated in its Order:

> The Company did not explain how this $1.2 million increase to inventory could take place overnight or why the number of units did not increase along with the increase in inventory value. The Department agrees that costs associated with a reasonable level of inventory are properly included in the equipment basket. In this case, however, the Company has not met its burden of proof in justifying this $1.2 million addition to inventory.[40]

The DPUC therefore disallowed the $1,222,706 from Crown's reported gross book value of leased equipment.[41]

16. In its Appeal, Crown maintains that it followed the instructions to Part III, Schedule C in including in its equipment costs inventory "attributable to equipment kept for new customers and as replacement for broken equipment."[42] Crown also states that "the dollar amounts allocated to Schedule C were higher than normally would be expected due to the system being rebuilt."[43] In its Opposition to Crown's appeal, the DPUC maintains that it disallowed Crown's "inventory allocation" on the ground that Crown "had simply failed to make an adequate showing of why the value of equipment was increased."[44] The DPUC argues that Crown did not support the claim that substantial amounts of inventory were necessary to provide service during the rebuild and upgrade.[45] The DPUC argues that "such an unusually high proportion of equipment costs allocated to inventory requires a showing more than the simple, unsupported assertion of need offered by Crown."[46]

17. In rate regulation proceedings, the cable operator, not the local franchising authority, bears the burden of proof.[47] The determination of whether a cable operator should be allowed to recover the costs of allegedly excess inventory in its rates is an issue to be left to the discretion of the local franchising authority, and we will not disturb the findings of local franchising authorities if there is a reasonable basis for its decision. Based on the record before us, we do not find that it was unreasonable for the DPUC to adjust Crown's equipment costs to remove the "inventory allocation." Crown had notice of the City's concern about the inventory allocation and had ample opportunities through its exceptions to the City's draft order, and again to the revised draft order, to provide an adequate explanation of the amount at issue.[48] Crown's arguments on appeal fail to identify or even suggest any basis for finding it unreasonable for the DPUC to have required additional information or for the DPUC to have found Crown's explanation insufficient. We believe that the DPUC was within its authority to require Crown to provide a detailed explanation of the increase to equipment values. The DPUC was also within its authority to find Crown's explanation insufficient and therefore to disallow the amounts attributable to the "inventory allocation." Accordingly, we reject Crown's arguments that the "inventory allocation" must be included in calculating Crown's leased equipment capital costs.

III. ORDERING CLAUSES

18. ACCORDINGLY, IT IS ORDERED that the appeals of local rate orders filed by Crown Media, Inc., with respect to the issue of the valuation of Crown's capital costs, are REMANDED to the State of Connecticut Department of Public Utility Control for resolution in accordance with the terms of this Order.

19. IT IS FURTHER ORDERED that the appeals of local rate orders filed by Crown Media, Inc., with respect to the issue of the disallowance of the inventory allocation are DENIED.

20. IT IS FURTHER ORDERED that, in light of the resolution of its appeals herein, the requests for stay filed by Crown Media, Inc. ARE DISMISSED as moot.

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[35] DPUC Order in Docket No. 93-12-10, at 9.
[36] *See* DPUC Order in Docket No. 93-12-10, at 9.
[37] DPUC Order in Docket No. 93-12-10, at 9 (citing Crown July 28, 1994 Exceptions to Draft Decision, Attachment A, Part I-Summary of Values).
[38] *See* DPUC Order in Docket No. 93-12-10, at 9; DPUC Opposition, Exhibit B, Crown Response to Interrogatory CATV-22, at 8.
[39] DPUC Order in Docket No. 93-12-10, at 10 (quoting Crown August 9, 1994 Exceptions, p. 4).
[40] DPUC Order in Docket No. 93-12-10, at 10.
[41] DPUC Order in Docket No. 93-12-10, at 9. After making the disallowance, the DPUC then adjusted the remaining amount ($1,551,295) by the amount necessary to reflect original cost.
[42] Crown Appeal at 10.
[43] Crown Appeal at 10.
[44] DPUC Opposition at 6.
[45] DPUC Opposition at 6-7.
[46] DPUC Opposition at 6-7.
[47] *See* 47 C.F.R. § 76.937.
[48] *See* DPUC Order in Docket No. 93-12-10, at 9-10.

21. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 6, 1995

BELL ATLANTIC PETITIONS FOR EXPEDITED WAIVER OF PART 69 OF THE COMMISSION'S RULES

Pleading Cycle Established

COMMENTS: April 20, 1995

REPLY COMMENTS: April 27, 1995

On February 22, 1995, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a petition for waiver of Sections 69.110, 69.111, and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.110, 69.111, and 69.112. Bell Atlantic seeks a waiver to create new switched access service elements to introduce switched transport services based on Synchronous Optical Network (SONET) technology.

Bell Atlantic states that the SONET-based services it proposes are the type of offerings the Commission envisioned when it mandated expanded interconnection. According to Bell Atlantic, services provisioned on SONET-based fiber ring technology will allow Bell Atlantic to meet its end user and carrier customers' demands for survivability and reliability of critical high capacity switched transport circuits in a cost effective manner. Interested parties may file comments on Bell Atlantic's petition for waiver no later than April 20, 1995. Replies should be filed by April 27, 1995.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-368

In the Matter of

Fone America, Inc.

ORDER

Adopted: April 13, 1995; Released: April 14, 1995

By the Chief, Common Carrier Bureau:

1. On December 23, 1991, the Common Carrier Bureau released Orders directing certain operator service providers (OSPs), including Fone America, Inc. (Fone America), to demonstrate that their rates are just and reasonable and to begin announcing, at the beginning of each call, that their rates are available upon request.[1] The Telephone Operator Consumer Services Improvement Act of 1990 authorizes the Commission to impose either or both of these requirements on any OSP whose rates and charges filed pursuant to that act appear, upon review, to be unjust or unreasonable. *See* 47 U.S.C. § 226(h)(2).

2. On October 4, 1993, Fone America filed revisions to its informational tariff which reduced its rates substantially. Fone America's October 1993 revisions represent a reduction of approximately 36 percent from the highest total charge it had reported earlier. It was on the basis of the rates Fone America had in effect at the time of the December 23 Order that the Bureau found Fone America's rates appeared to be unjust and unreasonable. Fone America no longer charges the rates that prompted this proceeding. We therefore conclude that there is no longer a need to require Fone America to announce, at the beginning of each call that it handles, that its rates are available upon request.[2] We hereby remove this requirement previously imposed on Fone America and terminate the captioned proceeding.

3. Accordingly, IT IS ORDERED that the proceeding initiated in CC Docket No. 91-368 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[1] *See e.g.*, In the Matter of Fone America, Inc., 7 FCC Rcd 181 (Com. Car. Bur. 1991).

[2] We emphasize that this Order does not represent an affirmative finding that Fone America's rates are just and reasonable.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Partitioning Plan of
Bay Springs Telephone Company,
PCS PRIMECO, L.P. and Peterson
County Communications, L.P.

DECLARATORY ORDER

Adopted: April 18, 1995; Released: April 18, 1995

By the Chief, Wireless Telecommunications Bureau:

1. Before the Wireless Telecommunications Bureau ("Bureau") for consideration is a request, filed on April 14, 1995, by Bay Springs Telephone Company, Inc.[1] ("Bay Springs"), PCS PRIMECO, L.P. ("PRIMECO") and Peterson County Communications, L.P. ("Peterson"). Bay Springs provides telephone service to the rural areas surrounding Jackson, Hattiesburg, and Laurel, Mississippi.[2] PRIMECO was the winning bidder for the "B Block" broadband personal communications service ("PCS") license that covers the New Orleans-Baton Rouge Major Trading Area ("MTA").[3] Peterson is a prospective applicant for the "C Block" broadband PCS license that serves the Jackson Basic Trading Area[4] ("BTA").[5] The parties jointly request a determination that a partitioning plan, encompassing the New Orleans-Baton Rouge MTA and the Jackson BTA, would conform to the requirements of Section 24.714(d) of the Commission's Rules, 47 C.F.R. § 24.714(d). For the reasons described below, the Bureau finds that the proposed partitioning plan is in compliance with Section 24.714(d), and would further the Commission's goal of expediting the provision of broadband PCS to rural areas.[6]

2. In the *Fifth Report and Order*, PP Docket No. 93-253, the Commission decided that rural telephone companies should be permitted to obtain broadband PCS licenses by partitioning sections of an MTA or BTA.[7] Partitioning was adopted to promote investment in and rapid deployment of new technologies in rural areas, and to provide rural telephone companies with opportunities to implement wireless services that could complement or replace the landline network.[8] Rural telephone companies that meet the definition set forth in Section 24.720(e) of the Rules, 47 C.F.R. § 24.720(e),[9] are permitted to obtain a partitioned license through either 1) forming bidding consortia and then partitioning the license among the parties to such consortia, or 2) private negotiations with a potential broadband PCS licensee either before or after the auction.[10]

3. The Commission, in Section 24.714(d) of the Rules, also established certain requirements for partitioned areas. Partitioned areas must conform to established geopolitical boundaries (such as county lines) and each partitioned area must include all portions of the rural telephone company's wireline service area that lies within the PCS service area. Finally, the partitioned area must be reasonably related to the rural telephone company's wireline service area. In further refining what is meant by the term, "reasonably related," the Commission established a general presumption of reasonableness if the partitioned areas contain no more than twice the population of that portion of a rural telephone company's wireline service area that lies within the PCS service area. At the same time, the Commission recognized "that rural telephone companies will require some flexibility in fashioning areas in which they will receive partitioned licenses," and thus declined to adopt a strict rule concerning the reasonableness of the partitioned areas.[11]

4. Bay Springs represents that it is a rural telephone company within the meaning of Section 24.720(e) of the Commission's Rules.[12] Bay Springs seeks to obtain from PRIMECO and Peterson partitioned sections of the New Orleans-Baton Rouge MTA and the Jackson, MS BTA that follow established geopolitical boundaries. Specifically, PRIMECO anticipates partitioning a portion of the "B Block" broadband PCS license for the New Orleans-Baton Rouge MTA to conform to the boundaries of the Laurel and Hattiesburg Mississippi BTAs. Peterson intends to partition five of the fourteen counties contained in the "C Block" broadband PCS license for the Jackson, MS BTA: Scott, Smith, Rankin, Madison and Hinds counties.[13] Bay Springs provides local telephone service to customers in the Laurel and Hattiesburg BTAs, as well as Scott, Smith

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[1] Bay Springs Telephone Company, Inc. is a subsidiary of Telephone Electronics Corporation.

[2] April 14, 1995 Letter from Bay Springs Telephone Company, Inc., PCS PRIMECO, L.P. and Peterson County Communications, L.P. to Regina Keeney, Chief, Wireless Telecommunications Bureau ("Request") at 4-5.

[3] Request at 2.

[4] The 51 MTAs and 493 BTAs divide this country into geographic regions, and were designed by Rand McNally based on the natural flow of commerce. In establishing the MTA and BTA boundaries, Rand McNally considered factors such as physiography, population distribution, newspaper circulation, economic activities, highway facilities, railroad service, suburban transportation, and analysts' field reports. Rand McNally *1992 Commercial Atlas and Marketing Guide*, 123rd Edition, 36-40.

[5] Request at 2.

[6] The Commission's policies in this area are intended to implement Section 309(j)(3)(A) of the Communications Act, 47 U.S.C. § 309(j)(3)(A), which in turn directs the Commission to adopt auction rules that will promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas." *See also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(C) and 309(j)(4)(D).

[7] *See generally* 9 FCC Rcd 5532 (1994), paras. 150-152.

[8] 9 FCC Rcd 5532, paras. 150 and 152.

[9] 47 C.F.R. § 24.720(e) defines a rural telephone company as "a local exchange carrier having 100,000 or fewer access lines, including all affiliates."

[10] 9 FCC Rcd 5532 at para. 151.

[11] Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994), para. 151; Fifth Memorandum Opinion and Order, PP Docket No. 93-253, 10 FCC Rcd 403 (1994), paras. 112-113.

[12] Request at 2.

[13] *Id.*

and Rankin counties.[14] Bay Springs admits, however, that populations within the areas to be partitioned far exceed the population standards set forth in the note to Section 24.714 of the Commission's Rules that establish a presumption of reasonableness for the partitioned areas.[15] Bay Springs, PRIMECO and Peterson therefore rely upon an alternative approach to demonstrate that the partitioned area is reasonably related to Bay Springs' wireline service area.

5. The parties argue that an analysis of Bay Springs' wireline customer base demonstrates strong economic interdependence between the area Bay Springs currently serves and the Jackson, Laurel and Hattiesburg Basic Trading Centers.[16] Specifically, the parties argue that limiting Bay Springs to serving its immediate rural telephone exchange would unduly limit its ability to serve the mobile communications needs of most rural customers, who must travel to the Basic Trading Centers of Jackson, Hattiesburg and Laurel to shop, obtain specialized services, maintain employment or seek higher education.[17] Therefore, including these three Basic Trading Centers in the partitioning plan would facilitate the provision of PCS to Bay Springs' customers in a service area that best reflects the mobile communications requirements of the population in this part of rural Mississippi.[18]

6. The parties further demonstrate that because Bay Springs has a proven ability to serve these sparsely populated areas it is uniquely positioned to expedite broadband PCS throughout the region. The Commission has observed that rural telephone companies can make efficient use of their existing infrastructure to speed service to rural areas.[19] The need to expedite service is particularly compelling in this instance because, while Jackson and Hattiesburg are both fully served by two cellular carriers, barely half of the rural areas within the Bay Springs' local exchange are served by even one cellular carrier.[20] Therefore, by permitting this partitioning plan, Bay Springs' customers will, at a minimum, be able to avail themselves of a competitive alternative to the single cellular provider. The ultimate benefit to Bay Springs' customers of partitioning will be the ability, for the first time, to subscribe to an advanced wireless mobile communications service that achieves comprehensive coverage throughout the area where they live and work.

7. In sum, we find that the partitioning plan as represented satisfies the requirements of 24.714(d) of the Commission's Rules. The parties have amply demonstrated that the partitioning plan 1) conforms to established political boundaries, 2) includes the wireline service area of Bay Springs, and 3) is reasonably related to the Bay Springs wireline service area, given the economic interdependence of the partitioned area and the Bay Springs local exchange area. Permitting such partitioning would further the Commission's objective of expediting the provision of advanced technologies to rural areas.

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and Section 24.714(d) of the Commission's rules, 47 C.F.R. § 24.714(d), that the partitioning plan submitted by Bay Springs Telephone Company, Inc., PCS PRIMECO, L.P. and Peterson County Communications, L.P. is APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

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[14] *Id.*

[15] Request at Note 2.

[16] Each BTA has a Basic Trading Center. Residents of the BTA travel to the Basic Trading Center to make the bulk of their shopping goods purchases. Rand McNally *1992 Commercial Atlas and Marketing Guide*, 123rd Edition, 4.

[17] Request at 3-4.

[18] While the parties indicate that permitting the partitioning plan would also result in an economically viable PCS system, we do not base our decision on this factor. Rather, we rely on representations by the parties that implementation of the partitioning plan will expedite the delivery of high quality broadband PCS to Bay Springs' customers.

[19] Fifth Report and Order, 9 FCC Rcd 5532 (1994), para. 150; Further Notice of Proposed Rule Making, PP Docket No. 93-253, 9 FCC Rcd 6775 (1994), para. 3.

[20] Request at Note 3 and at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Grant of Applications for 800 MHz SMR, Business, Industrial/Land Transportation and General Category Channels Received Between November 8, 1993 and August 10, 1994

ORDER

Adopted: April 17, 1995; Released: April 17, 1995

By the Chief, Wireless Telecommunications Bureau:

1. On March 17, 1995, the Wireless Telecommunications Bureau ("Bureau") released a public notice announcing its completion of its review of approximately 40,000 applications received between November 8, 1993 and August 10, 1994 for channels in the SMR, Business, Industrial/Land Transportation, and General Categories.[1] In the *800 MHz Application Grants Public Notice*, the Bureau also granted more than 4,500 of those applications.[2] We have received a Petition for Reconsideration filed on April 13, 1995 by the American Mobile Telecommunications Association, Inc., the Industrial Telecommunications Association, Inc., including its Council of Independent Communications Suppliers, and the Personal Communications Industry Association (collectively, the "Coalition") requesting reconsideration of the license grants made in the *800 MHz Application Grants Public Notice*. The Coalition submits that "the public interest would be greatly served, and Bureau resources conserved, by making slight modifications to the Coalition software used to assist the Bureau to process backlogged 800 MHz applications, re-processing the applications, and issuing a revised list of granted licenses."[3] Section 1.113 of the Commission's rules provides, in pertinent part, that "[w]ithin 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion."[4]

2. Given the significant number of authorizations affected by the *800 MHz Application Grants Public Notice* and the number of licensees that could be potentially affected if the Commission acted favorably upon the Coalition's request, we conclude that the public interest would be served by modifying such license grants to be conditional grants pending the Bureau's disposition of the Coalition's Petition.

3. Accordingly, IT IS HEREBY ORDERED, pursuant to Section 1.113 of the Commission's Rules, 47 CFR § 1.113(a), that the license grants made in the *800 MHz Application Grants Public Notice* issued by the Bureau on March 17, 1995 ARE MODIFIED as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney, Chief
Wireless Telecommunications Bureau

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[1] Wireless Telecommunications Bureau Processes Over 40,000 and Grants More than 4500 Applications for 800 MHz SMR, Business, Industrial/Land Transportation and General Category Channels Received Between November 8, 1993 and August 10, 1994, *Public Notice*, released March 17, 1995 ("*800 MHz Application Grants Public Notice*").

[2] *Id.*

[3] Coalition Petition at 1.

[4] 47 CFR § 1.113(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 19, 1995

AMERITECH FILES PETITION FOR WAIVER OF PART 69 OF THE COMMISSION'S RULES

Pleading Cycle Established

COMMENTS: May 3, 1995
REPLY COMMENTS: May 10, 1995

On March 31, 1995, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of Section 69.106 of the Commission's Rules, and any other relevant portions of Part 69, to establish a new nonrecurring rate element for its 900 access service. Ameritech asserts that this rate element will permit it to recover the costs of switch translation changes necessary to allow access customers to activate a 0+ option at the time they initially order 900 access service.

Ameritech states that its switched access tariff currently includes nonrecurring rate elements to recover the costs of activating 900 NXX codes. It states that its tariff also includes a rate element that permits customers to activate a 0+900 service option subsequent to the initial request for 900 access service in a Local Access Transport Area (LATA). Ameritech now seeks to offer customers the additional option of ordering 0+900 service access at the time of their initial request for 900 access service in a LATA.

Interested parties may file comments on Ameritech's petition no later than May 3, 1995. Replies must be filed by May 10, 1995. An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 20, 1995

AT&T FILES PETITION FOR WAIVER OF PRICE CAP RULES

Pleading Cycle Established

COMMENTS: April 30, 1995
REPLY COMMENTS: May 8, 1995

On April 17, 1995, AT&T Corp. (AT&T) filed a petition for waiver of Sections 61.43, 61.44 and 61.58 of the Commission's Rules, 47 C.F.R. §§ 61.43, 61.44 and 61.58. Specifically, AT&T requests that the Commission waive its price cap rules to permit AT&T to submit its annual 1995 price cap filing, making its new price cap indices effective on July 1, 1995, without reflecting changes in AT&T's costs resulting from the annual tariff filings by local exchange carriers, and to make the index effect of those access cost changes effective on August 1, 1995.

Interested parties may file comments on AT&T's petition no later than April 30, 1995. Replies must be filed by May 8, 1995.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Dan Abeyta, Tariff Division, Common Carrier Bureau, at (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI OF GREENSBURG

Appeal of Local Rate
Order of Township of
North Huntingdon, PA

ORDER

Adopted: April 4, 1995; Released: April 6, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 13, 1995, TCI of Greensburg ("TCI"), the franchisee in the above-matter, filed a Petition for Review ("appeal") of a local rate order adopted by its franchising authority, the Township of North Huntingdon, Pennsylvania ("the Township"), on December 14, 1994. On January 17, 1995, TCI filed a Request for Emergency Stay pending Commission review of its appeal. The Township did not file an opposition to either the stay petition or appeal. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot. The Township's local rate order requires TCI to establish a new rate schedule for its basic service tier and associated equipment and installations and to issue refunds to subscribers for charges in excess of the newly established rates for the time period beginning September 1, 1993 and ending July 15, 1994.[1]

2. TCI raises five issues in its appeal: (1) that the Township unlawfully ordered subscriber refunds even though its authority to order refunds had expired; (2) that the Township improperly imposed refund liability dating back to September 1993 and failed to follow the mathematical formula required by the Commission for calculating refunds; (3) that the Township improperly ordered TCI to issue refunds to both present and former subscribers; (4) that the Township improperly reduced TCI's installation rates by 17% and (5) that the Township improperly required TCI to provide external cost information "by channel." TCI claims that each of these actions resulted in a misapplication of the Commission's rate regulations and violated the 1992 Cable Act. We address each issue in turn.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[2] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[3] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[4] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[5]

A. Refund Liability

4. When a cable operator files either a benchmark or cost-of-service rate justification, the Commission's rules provide a franchising authority 30 days in which to review the rate filing before the proposed rates become effective.[6] In cases involving benchmark filings (i.e., filings based on FCC Form 393), a franchising authority may toll this deadline for an additional 90 days if it needs more time to review the filing, giving the franchising authority a total of 120 days to issue an order before the proposed rates go into effect.[7] At the end of the 120-day period (the original 30 days plus the additional 90 days), the proposed rates will go into effect if the franchising authority has not issued a rate decision.[8] The franchising authority, however, may still preserve its authority to order subscriber refunds based on the new rates by issuing an accounting order, directing the cable operator to keep an accurate account of its financial records.[9] If a franchising authority has not rendered a decision within the available 120-day review period and has not issued an accounting order before that period has expired, the franchising authority may not later order subscriber refunds under our rules.[10] We wish to be clear that

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b) (1992).

[2] *See* 47 C.F.R. § 76.944 (1993).

[3] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[4] *Id.*

[5] *Id.*

[6] *See* 47 C.F.R. § 76.933(a) (1993).

[7] *See* 47 C.F.R. § 76.933(b) (1993). In the case of a cost-of-service filing, the local franchising authority may extend the review period by 150 days. *Id.* This would give the local franchising authority a total of 180 days (the original 30 days plus the additional 150 days) to review the cost-of-service filing before the proposed rates would go into effect.

[8] *Id.*

[9] *See* 47 C.F.R. § 76.933(c) (1993).

[10] "If a franchising authority has availed itself of the additional 90 or 150 [for cost-of-service proceedings] days permitted in paragraph (b) of this section, and has taken no action within these additional time periods, then the proposed rates will go into effect at the end of the 90 or 150 day period, or existing rates will remain in effect at such times, subject to refunds if

our rules provide that the issuance of an accounting order is necessary only to preserve refund authority. A franchising authority that does not issue an accounting order before its allowable period of review expires may still prescribe rates and order a prospective rate reduction.

5. Because the Township did not issue an accounting order before the conclusion of its review period, it lost the authority to order subscriber refunds.[11] As a result of the Township's failure to issue an accounting order, the other refund-related issues raised by TCI; namely, that the Township improperly imposed refund liability back to September 1993, failed to follow the Commission's rate formula in calculating its refund liability and ordered TCI to issue refunds to both present and former subscribers, are rendered moot. We note, however, that, although TCI is not liable for the refunds ordered by the Township with regard to its rates set under Form 393, in effect from September 1, 1993 until July 15, 1994,[12] this order has no effect upon the Township's authority to order subscriber refunds subsequent to July 15, 1994.

B. Installation Rates

6. TCI next contends that the Township improperly required TCI to lower all of its installation rates by 17%. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[13] Requiring cable operators to set all or some of their rates for equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[14]

7. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[15] In this proceeding, while the record is not clear, it appears that the Township did not dispute either the validity of the figures used in TCI's Form 393 or the accuracy of the calculations in the form. Under such circumstances, the Township must allow TCI to charge its maximum permitted rates, as derived by the Form 393. We are therefore remanding this issue to the Township so that it can reconsider its ruling in a manner consistent with our findings.

C. Per Channel Programming Costs

8. TCI next states that the Township's rate order "criticizes" it for failing to sufficiently justify its request for an external cost adjustment and "implicitly threatens" to reject the Form 1210 rate increase on that basis. Since the Township has taken no action that injures TCI, this issue is not ripe for resolution and we therefore dismiss it.

III. Ordering Clauses

9. Accordingly, IT IS ORDERED that the appeal of the local rate order adopted by the Township of North Huntingdon, Pennsylvania, with respect to TCI's refund liability, installation rates and per channel programming costs, IS REMANDED to the local franchising authority for further proceedings consistent with this opinion.

10. IT IS FURTHER ORDERED that TCI's appeal, with respect to per channel programming costs, IS DISMISSED.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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the franchising authority subsequently issues a written decision disapproving any portion of such rates, *provided, however*, that in order to order refunds, a franchising authority must have issued a brief written order to the cable operator by the end of the 90 or 150-day period permitted in paragraph (b) of this section directing the operator to keep an accurate account of all amounts received by reason of the rate in issue and on whose behalf such amounts were paid." 47 C.F.R. § 76.933(c) (1993) (emphasis in the original).

[11] Chillicothe Cablevision, Inc. (Washington Court House, Ohio), DA 95-479 (Cable Services Bureau, released March 14, 1995).

[12] The period at issue here is from September 1, 1993 to July 14, 1994 because TCI took advantage of the refund deferral period set out in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4184-86 (1994) (*"Second Recon. Order"*). Otherwise, the refund liability period under the Form 393 is from September 1, 1993 through May 15, 1994.

[13] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b) (1992).

[14] If a franchising authority required an operator to set its rates for equipment and installation below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installation at levels below actual cost.

[15] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ULTRACOM OF MARPLE, INC.

Appeal of Local
Rate Order of Township of
Haverford, PA

ORDER

Adopted: April 4, 1995; Released: April 6, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 12, 1994, UltraCom of Marple, Inc. ("UltraCom"), the franchisee in the above matter, filed an appeal of a local cable rate order adopted on September 12, 1994 by its franchising authority, the Township of Haverford, Pennsylvania ("the Township").[1] The Township opposes UltraCom's appeal.[2] The Township's rate order establishes a new regulated rate schedule for UltraCom's basic service tier rates and associated equipment and installations.[3] Specifically, the Township's rate order requires UltraCom to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its Appeal, UltraCom raises two issues. First, UltraCom argues that the Township's decision to set its rates for remote controls and home wiring at zero is inconsistent with statutory and regulatory provisions allowing cable operators to recover their actual costs for regulated equipment and constitutes an unconstitutional taking of UltraCom's property without just compensation. Second, UltraCom asserts that the Township's rate order did not disclose the basis for its decision and therefore failed to satisfy the procedural requirements of the Commission's rules. We address each issue in turn.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering the local rate order.[6] If the Commission reverses a franchising authority's decision, it willnot substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[8] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[9] After calculating actual aggregate revenues, the operator converts

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[1] On October 28, 1994, UltraCom filed an unopposed Petition for Stay of Enforcement Pending Review of the local rate order adopted by the Township. We granted UltraCom's stay request pending the resolution of this appeal. *See* Order (Petition for Stay of Local Rate Order of Township of Haverford, PA), DA 94-1255, 9 FCC Rcd 6835 (1994) (*"Haverford Stay Order"*).

[2] The Township filed its Opposition on November 8, 1995, which is 12 days past the deadline under our rules for such a filing. *See* 47 C.F.R. § 76.944(b). With its Opposition, the Township also filed a motion to accept the late-filed pleading. Though we may accept late-filed materials in appropriate circumstances, upon a showing of "good cause," *see* Meredith /New Heritage Strategic Partners, L.P., 9 FCC Rcd 6841 (1994), we will not accept the pleading since the Township has not shown "good cause" for the late filing of its Opposition. Therefore, we will deny the Township's motion that we accept its late-filed Opposition. We note that the Township's Opposition, even if timely filed, would not have affected the outcome of this appeal.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] *See* 47 C.F.R. § 76.944.

[5] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Report and Order"*); Third Order on Reconsideration in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[6] *Third Recon. Order*, 9 FCC Rcd at 4346.

[7] *Id.*

[8] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[9] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual costs and are separately calculated in Part III of Form 393.

6. Under our regulations the maximum permitted rates are deemed to be reasonable, as required under the 1992 Cable Act.[10] If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[11]

A. Zero Equipment Rates

7. Under the 1992 Cable Act and the Commission's rules cable operators are required to set their rates for regulated customer equipment and installations using a cost-based method.[12] In effect, cable operators must supply customer equipment, such as converters and remote controls, at rates based on their costs, including a reasonable rate of return. In this case, the Township set UltraCom's rates for the lease of remote controls and cable home wiring at zero without any explanation for this prescribed rate.[13] UltraCom contends that the Township's setting of those equipment rates at zero violates the Commission's rate regulations because it is not based on cost and therefore has no basis under the Commission's rules.[14]

8. Generally, the Commission leaves regulation of the basic service tier to the sound discretion of certified local franchising authorities. Because the Township has not indicated that it based its prescribed rate of zero for UltraCom's remote controls and cable home wiring based on cost, and because the Township has not affirmatively demonstrated in its rate order why UltraCom's proposed rates were unreasonable and why its prescribed zero rates are reasonable, we find that the Township's zero rate prescription was not in accordance with our rules and not within the scope of its regulatory authority.[15] The Township must set UltraCom's remote control and cable home wiring rates based on cost. If the Township prescribes a rate other than the one derived from UltraCom's Form 393, it must explain the basis for the prescribed rate.[16] This issue is therefore remanded to the Township so that it can reconsider its decision in a manner consistent with our findings.

B. Written Decision

9. UltraCom argues that the Township failed to satisfy the procedural requirements of the Commission's rules by failing to provide a written decision stating the bases for its rate prescription. Specifically, UltraCom asserts that the Township failed to demonstrate in its rate order why UltraCom's rates were unreasonable and why its own prescribed rates are reasonable. UltraCom further asserts that the Township did not make available to UltraCom a consultant's report or a copy of the computations on which the Township's decision was based, thus depriving it of the ability to effectively comment on the Township's decisions.

10. In rate regulation proceedings, the cable operator bears the burden of proving the reasonableness of all of its proposed regulated rates.[17] The local franchising authority, however, must provide the cable operator with an opportunity to participate in the rate review proceeding and to provide documentation supporting its proposed rates.[18] While a local franchising authority is free to seek the assistance of a consultant to review and verify the information presented in an operator's Form 393, nothing in our rules requires the local franchising authorities to do so. Similarly, nothing in our rules requires local franchising authorities to provide a cable operator with reports and calculations that it may have relied upon in rendering its rate decision. Local franchising authorities are provided considerable flexibility regarding the manner in which interested parties may participate in proceedings regarding rates for the basic service tier and accompanying equipment, "as long as they provide a reasonable opportunity for consideration of the views of interested parties and act within the prescribed time periods.[19]

11. If the local franchising authority determines that the operator's proposed rate exceeds the maximum permitted level as defined by the Commission's rate standards, it may prescribe a rate different from the proposed rate provided that, after giving the operator an opportunity to participate, the local franchising authority affirmatively demonstrates

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[10] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[11] If a franchising authority required an operator to set its rates for equipment and installation below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[12] *See* Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3); *Report and Order*, 8 FCC Rcd at 5800-5825.

[13] On its Form 393 (Part I), UltraCom's actual rate for remote controls is listed as $0.20 per month, while its maximum permitted rate is listed as $0.28 per month. UltraCom's actual rate for cable home wiring is listed as $0.95 per month, while its maximum permitted rate is listed as $1.46 per month. The Township set UltraCom's rate for remote controls and cable home wiring at zero.

[14] Although we did not rely on the Township's Opposition in reaching our decision here, we note that the Township does not argue that its zero rate was based on cost.

[15] *See Report and Order*, 8 FCC Rcd at 5723-5724. *See also Haverford Stay Order; Order* (Petition for Stay of Local Rate Order adopted by the City of West Hollywood, CA), DA 94-489, 9 FCC Rcd 2423 (1994).

[16] *See Report and Order*, 8 FCC Rcd at 5723-5724.

[17] *See* 47 C.F.R. § 76.937. *See also* Sammons Communications, Inc., DA 95-194 (Cities of Burbank and Glendale, CA), at ¶ 14 (Cab. Serv. Bur., released February 10, 1995).

[18] *See Report and Order*, 8 FCC Rcd at 5723-5724.

[19] *Third Recon. Order*, 9 FCC Rcd at 4340; *see Report and Order*, 8 FCC Rcd at 5716.

in a written decision why the operator's rate is unreasonable and why its prescribed rate is reasonable.[20] In this case, the Township's written decision consists of a one-page document that merely indicates that it has met the FCC's certification requirements in order to regulate the basic service tier and associated equipment, and lists the prices that UltraCom is required to charge for basic service and equipment.[21] The rate order does not state why the Township found UltraCom's rates to be unreasonable, nor does it state why its prescribed rates are reasonable. In order to comply with our rules, the rate order should contain such explanations.[22] Since it appears from the record below that the Township's written decision did not comport with our rules in this area, this issue is remanded for further proceedings consistent with this order.[23]

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Appeal filed by UltraCom of Marple, Inc. is REMANDED to the Township of Haverford, Pennsylvania for resolution in accordance with the terms of this order.

13. IT IS FURTHER ORDERED that the Township of Haverford's motion that the Commission accept its late-filed Opposition is DENIED.

14. IT IS FURTHER ORDERED that our stay of the rate order issued by the Township of Haverford which was granted pending the resolution of this appeal is hereby VACATED.

15. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[20] *See Report and Order*, 8 FCC Rcd at 5723-5724.

[21] *See* Appeal, Exhibit A (Township of Haverford's local cable rate order, Resolution No. 1089-94, adopted September 12, 1994).

[22] *See Report and Order*, 8 FCC Rcd at 5723-5724.

[23] UltraCom originally filed a rate justification, dated March 30, 1994, on a computer-generated version of Form 393, which was not generated by Commission approved software. *See* Appeal, Exhibit B. The Township ordered UltraCom to refile, using an actual FCC Form 393 or a copy of the actual form or a copy generated by Commission software. *See* Appeal, Exhibit C. Pursuant to the Township's order, UltraCom submitted an official version of Form 393, dated June 23, 1994, using a copy generated by Commission-approved software. *See* Appeal, Exhibit E. UltraCom argues that the Township acted unreasonably in setting its maximum permitted rate for the basic service tier below the rate derived by the official FCC Form 393 software, after the Township had specifically ordered the refiling. The fact that the Township ordered the refiling did not obligate it to accept automatically the rate that resulted from the refiling. However, regardless of whether the Township ordered the refiling of the rate justification, it was required to explain the basis for its prescribed rate. As discussed above, the Township failed to provide this explanation and we have ordered it to do so on remand.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of WEST MICHIGAN

Motion to Dismiss Appeal of
Local Rate Orders and Consider
Local Settlements for the Cities
of East Grand Rapids, Grand Rapids,
Grandville, Kentwood, Walker, and
Wyoming, Michigan and the Townships
of Ada, Alpine Charter, Cascade Charter,
Gaines Charter, Georgetown Charter,
Grand Rapids Charter, and Plainfield
Charter, Michigan

ORDER

Adopted: April 4, 1995; Released: April 6, 1995

By the Chief, Cable Services Bureau:

1. On April 20, 1994, TCI of West Michigan, Inc. ("TCI/WM") filed an appeal of the local rate orders, adopted March 21, 1994, by the municipalities identified above. In the local rate orders, the municipalities established regulated rates for basic cable service and associated equipment, provided by TCI/WM, as allowed by the Cable Television Consumer Protection and Competition Act of 1992. The local orders required TCI/WM to reduce the rates charged for basic cable service and equipment.

2. On March 20, 1995, TCI/WM filed with the Commission a motion to dismiss its earlier-filed appeal. In its motion, TCI/WM explained that the parties had reached agreement on a settlement. There being no opposition, TCI/WM's Motion to Dismiss is granted.

3. Accordingly, IT IS ORDERED THAT TCI/WM's Motion to dismiss appeal of the Local Rate Order for the municipalities of Michigan IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable Humboldt, Inc. CUID No. CA0587
Eureka, California

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1995; Released: April 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Cox Cable Humboldt, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in its Eureka, California franchise area, CUID No. CA0587. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was completed and served on Operator on September 5, 1993. It was received by the Commission on October 12, 1993.[11]

5. Operator filed a Form 393 on June 17, 1994.[12] On February 2, 1995, Operator provided the Commission with additional information in response to a request by Commission Staff.[13] In addition, Operator submitted information on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. Operator's monthly CPS price of $13.41 is higher than the maximum permitted per channel price of $13.07 as calculated in its February 7, 1995 filing. Thus, Operator has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate. Further-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the cable operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the cable operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in the cable operator's price for the period after May 14, 1994 may be required to reflect the fact that the cable operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator has not complied with 47 C.F.R. § 76.956(a), which requires a cable operator to state when the first complaint was served upon it. Under these circumstances, we will consider the mailing date indicated by the original complainant as the service date.

[12] The date block (Part 1, Page 3) on this Form 393 bears the date November 11, 1993.

[13] Letter from Ann Pellatz, Controller, Cox Cable Humboldt, Inc. to David O. Ward of the FCC, February 2, 1995.

[14] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan.20, 1995) (together, *Public Notice*).

more, upon review we have determined that Operator has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to its calculations in Form 393 in addition to those already made by the Operator in its February 7, 1995 filing:

a. In Line 101, Columns A and B of Part II, Worksheet 1 of its FCC Form 393, Operator used different rates than what appear on the rate card that Operator supplied with its February 2, 1995 filing. Pursuant to the instructions on Form 393, Operator should have used rates that were in effect on September 1, 1993. We therefore recalculate Line 101, Columns A and B (and subsequent steps) using the prices for the basic and CPS tiers found in the rate card.

b. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered in Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[15] However, Operator's entries on these two lines varied substantially. Accordingly, we changed Line 104 to equal the figure that appears on Line 34.

c. In its February 7, 1995 filing, Operator states that it had 26 rate-regulated satellite channels in service on September 1, 1993. However, we counted 27 rate-regulated satellite channels on a channel line-up provided by Operator. Accordingly, we recalculated the Benchmark Channel Rate on Form 393, Part II, Worksheet 1, Line 121 using the correct number of satellite channels and entered .639 on Line 121.

d. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Form 393, Operator calculated the Inflation Adjustment Factor using data it relied upon when it set its $13.41 CPS price. If based on this data Form 393 indicated that Operator's price was reasonable, then Operator would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[16] However, Operator has not shown that its price was reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date Operator was required to file Form 393.[17] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993 of 1.030.

IV. CONCLUSIONS

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $12.90 per month (plus franchise fee) for the period starting on October 12, 1993 and ending on May 14, 1994.[18]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 5, 1993 complaint against the cable programming service price charged by Cox Cable Humboldt, Inc. in Eureka, California, CUID No. CA0587, and all other complaints in this franchise area relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Cox Cable Humboldt, Inc. shall refund to subscribers in the franchise area designated by CUID No. CA0587 that portion of the amount paid for cable programming service from October 12, 1993[19] to May 14, 1994, that exceeded $12.90 per month (plus franchise fee) and was thus unreasonable, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Cox Cable Humboldt, Inc. shall promptly determine the overcharges to CPS subscribers in CUID No. CA0587 for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Cox Cable Humboldt, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing for CUID No. CA0587 for the period beginning May

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[15] *See Questions and Answers on completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations...operators will enter on Line 104 the same, or nearly the same, number as on Line 301.")

[16] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form."

[18] This finding is based solely on the representations of the cable operator listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation, or argument made by any party to this proceeding not specifically addressed herein.

[19] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

15, 1994, to reduce the monthly charge per tier as of March 31, 1994 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).[20]

12. IT IS FURTHER ORDERED that Cox Cable Humboldt, Inc. shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for CUID No. CA0587 that reflects the reduction in the CPS rate determined in this Order.

13. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.950, that Operator shall not be required to obtain advance approval of adjustments to its CPS price in the franchise area addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

[20] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable of Greater Hartford, Inc. CUID Nos.
CT0034 (Rocky Hill)
CT0035 (Wethersfield)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1995; Released: April 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Cox Cable of Greater Hartford, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in its Rocky Hill and Wethersfield, Connecticut franchise areas, CUID Nos. CT0034 and CT0035.[1] Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. PROCEDURAL MATTERS

4. A complete and timely CPS complaint for CUID Nos. CT0034 and CT0035 was completed and served on Operator by the Connecticut State Attorney General on September 1, 1993. It was received by the Commission on September 3, 1993.

5. Operator filed a single Form 393 with the Commission for both franchise areas covered by this Order on November 15, 1993.

III. DISCUSSION

6. Operator asserts that its monthly CPS price of $10.28 is equal to its maximum permitted per channel price of $10.28 as calculated in its filing. However, upon review we have determined that Operator has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a subchapter "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e.,

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[1] Operator filed a single FCC Form 393 for both franchise areas, indicating that the two franchise areas constitute a single system with identical rates and programming.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the cable operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*Second Order on Reconsideration*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the cable operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in the cable operator's price for the period after May 14, 1994 may be required to reflect the fact that the cable operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See* Second Order on Reconsideration, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also* Second Order on Reconsideration, 9 FCC Rcd at 4189 n.195.

calculate the tax as a percentage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. In Line 101, Columns A and B of Part II, Worksheet 1 of its FCC Form 393, Operator used different rates than those on the rate card for September 1, 1993 which Operator filed along with the Form 393. Pursuant to the instructions on Form 393, Operator should have used rates that were in effect on September 1, 1993. Similarly, Operator's entries in Part II, Worksheet 2, Line 201, Columns A and B did not match the rates on its September 30, 1992 rate card. We therefore recalculate Lines 101 and 201, Columns A and B (and subsequent steps) using the prices for the basic and CPS tiers found in Operator's rate cards.

c. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered in Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Part II, Step G, Line 34.[13] However, Operator's entries on these two lines varied substantially. Accordingly, on Line 104 we enter the same figure that appears on Line 34, as adjusted pursuant to paragraph 6a, *supra*.

d. Because of these errors, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Operator apparently calculated the Inflation Adjustment Factor using data it relied upon when it set its $10.28 CPS price. If based on this data Form 393 indicated that Operator's prices were reasonable, then Operator would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[14] However, Operator has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator timely filed FCC Form 393.[15] On July 29, 1994, the U. S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993 of 1.030.

IV. CONCLUSIONS

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. We further conclude that Operator's showing justifies a maximum reasonable CPS tier price of $10.20 per month (plus franchise fee) for the period September 3, 1993 to May 14, 1994.[16]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 1, 1993 complaint against the cable programming service price charged by Cox Cable Greater Hartford, Inc., in Rocky Hill and Wethersfield, Connecticut, CUID Nos. CT0034 and CT0035, IS GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Cox Cable Greater Hartford, Inc., with respect to Rocky Hill and Wethersfield, Connecticut, CUID Nos. CT0034 and CT0035, for the period beginning on September 3, 1993 and ending on May 14, 1994, justifies a maximum price of $10.20 per month (plus franchise fee) for Operator's cable programming service tier.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Cox Cable Greater Hartford, Inc. shall refund to subscribers in the franchise areas designated by CUID Nos. CT0034 and CT0035 that portion of the amount paid for cable programming service from September 3, 1993[17] to May 14, 1994, that exceeded $10.20 per month (plus franchise fee) and was thus unreasonable, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Cox Cable Greater Hartford, Inc. shall promptly determine the overcharges to CPS subscribers in CUID Nos. CT0034 and CT0035 for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

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[12] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[13] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations... operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[14] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be justified in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form."

[16] This finding is based solely on the representations of the cable operator listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Cox Cable Greater Hartford, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing for CUID Nos. CT0034 and CT0035 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for those franchise areas (plus franchise fee).[18]

13. IT IS FURTHER ORDERED that Cox Cable Greater Hartford, Inc. shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for CUID Nos. CT0034 and CT0035 that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

[18] We reserve the right to make further adjustment to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Cable Television Corporation CUID Nos.
NE0064 (Bellevue)
NE0080 (Sarpy)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1995; Released: April 17, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator[1] ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Forms 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on May 31, 1994.[12]

5. In its amended benchmark filing of May 31, 1994, Operator calculated a maximum permitted price for the CPS tier of $10.18 per month. However, Operator's actual price for the CPS tier was $10.49 per month. Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e.,

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[1] In addition to the name "United Cable Television Corporation", Operator has filed papers in this case under the following names: TCI Central, Inc.; TCI Cable of the Midlands; TCI Cablevision of Nebraska, Inc. and United Cable Television of Sarpy County, Inc.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] Operator filed an amended FCC Form 393 for CUID No. NE0064 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). In a recent letter, Operator confirmed that its filing for CUID No. NE0080 is the same as its filing for CUID No. NE0064. Letter from Andrew C. Elson, TCI, to Mary E. Woytek, FCC (April 1, 1995).

calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.[14]

b. Since we conclude that Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[15] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993, the base date Operator used in justifying its rates.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $10.11 (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[16]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix A that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[17] to May 14, 1994 which exceeded $10.11 (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price (plus franchise fee).[18]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NE0064	11/10/93	11/05/93
NE0080	10/12/93	10/05/93

[13] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also* Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] We also note that Operator's methodology in completing Schedule A of Part III is not consistent with its related explanations or its entry on Part III, Step A, Line 1. Specifically, Operator completed Schedule A (Capital Costs of Service Installations and Maintenance of Equipment) using figures that were reduced to represent only costs related to installations and customer leased equipment, but the costs it carried into Line 1 included capital costs related to maintenance of all system equipment. In order to achieve the correct result after grossing up the tax entries, we recalculated Schedule A using unreduced capital costs.

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[18] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable Santa Barbara, Inc. CUID Nos.
Goleta, California CA0017 (City of Carpinteria)
CA0023 (City of Santa Barbara)
CA1279 (County of Santa Barbara)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1995; Released: April 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Cox Cable Santa Barbara, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in its Santa Barbara, California system, CUID Nos. CA0017, CA0023 and CA1279.[1] Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas addressed in this Order were completed and served on Operator and received by the Commission on the dates set forth in Appendix A.[12]

5. Operator filed original and amended Forms 393 on the dates set forth in Appendix B. In addition, on January 31, 1995 Operator filed a response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings, which concerned the franchise areas covered by this Order.[13]

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[1] According to Operator, CUID numbers CA0017, CA0023 and CA1279 together constitute a single cable system and have the same programming and rates. Letter with rate cards and channel listings attached from Christina Villanueva, Director of Finance and Administration for Cox Cable Santa Barbara, Inc. to David O. Ward of the FCC (February 2, 1995).

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the cable operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the cable operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in the cable operator's price for the period after May 14, 1994 may be required to reflect the fact that the cable operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] Operator has not complied with 47 C.F.R. § 76.956(a), which requires it to state when the complaints were served upon it. Under these circumstances, we will consider the mailing dates indicated by the complainants as the service dates of all complaints.

[13] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (January 20, 1995) (together, *Public Notice*).

III. DISCUSSION

6. In its January 31, 1995 amended filing Operator calculated a maximum permitted price for the CPS tier of $7.22 per month for all three franchise areas covered by this Order. However, Operator's actual price for the CPS tier was $7.29 per month for all three franchise areas covered by this Order. Thus, Operator has failed to show that its CPS rate was not unreasonable. Furthermore, upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered in Part II, Worksheet 1, Line 104 should have been close to or identical to its equipment cost on Part III, Step G, Line 34.[14] However, Operator's entries on these two lines differed substantially. Accordingly, we changed Line 104 to equal the figure that appears on Line 34.

b. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Form 393, Operator apparently calculated the Inflation Adjustment Factor using data it relied on when it set its $7.22 CPS price. If based on this data Form 393 indicated that Operator's price was reasonable, then Operator would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.[15] However, Operator has not shown that its price was reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data for the date Operator was required to file Form 393 for each franchise area.[16] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate Inflation Adjustment Factors of 1.030 through October 1993 for CUID No. CA0017, 1.034 through December 1993 for CUID No. CA0023, and 1.032 through November 1993 for CUID No. CA1279.

IV. CONCLUSIONS

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator's showing supports a maximum reasonable monthly CPS tier price of $7.19 for CUID No. CA0017, $7.22 for CUID No. CA0023, and $7.21 for CUID No. CA1279 (plus franchise fees) for the period that begins with the date the Commission received the first complete and timely CPS complaint for each franchise area, as listed in Appendix A, to May 14, 1994.[17] With respect to CUID Nos. CA0023 and CA1279, we determine that the refund at issue is such a *de minimis* amount that it would not serve the public interest to order a refund. With respect to CUID No. CA0017, we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. §76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced in Appendix A against the cable programming service price charged by Cox Cable Santa Barbara, Inc., in CUID Nos. CA0017, CA0023 and CA1279, and all other complaints in these franchise areas relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Cox Cable Santa Barbara, Inc., with respect to CUID Nos. CA0017, CA0023 and CA1279, for the period beginning with the receipt by the Commission of a complete and timely complaint for each franchise area covered by this Order (see Appendix A) and ending on May 14, 1994, justifies a maximum monthly price of $7.19 for CUID No. CA0017, $7.22 for CUID No. CA0023, and $7.21 for CUID No. CA1279 (plus franchise fees) for Operator's cable programming service tier.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Cox Cable Santa Barbara, Inc. shall refund to subscribers in the franchise area designated by CUID No. CA0017 that portion of the amount paid for cable programming service from September 21, 1993,[18] to May 14, 1994, that exceeded $7.19 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Cox Cable Santa Barbara, Inc. shall promptly determine the overcharges to CPS subscribers in CUID No. CA0017 for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including fran-

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[14] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations... operator will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[15] Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form."

[17] This finding is based solely on the representations of the cable operator listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[18] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

chise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Cox Cable Santa Barbara, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings for CUID Nos. CA0017, CA0023 and CA1279 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price in each franchise area (plus franchise fee).[19]

13. IT IS FURTHER ORDERED that Cox Cable Santa Barbara, Inc. shall place into effect, within 30 days after submission of the revised Form 1200 filings required above, CPS tier prices for CUID Nos. CA0017, CA0023 and CA1279 that reflect the reductions in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order, due to Operator's having submitted in good faith an optional supplemental filing in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

APPENDIX A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served on Cox Cable
CA0017	09/21/93	09/17/93
CA0023	12/30/93	12/23/93
CA1279	11/23/93	11/17/93

APPENDIX B

CUID No.	Date First Form 393 Filed	Date Amended Form 393 Filed
CA0017	01/12/94	02/22/94
CA0023	01/12/94	03/21/94
CA1279	11/15/93	None Filed

[19] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Greater Michigan, Inc.	CUID Nos. MI0040 (Petoskey), MI0047 (Boyne City), MI0048 (Charlevoix), MI0049 (East Jordan), MI0126 (Harbor Springs), MI0264 (Charlevoix), MI0294 (Resort), MI0295 (Littlefield), MI0296 (West Traverse), MI0357 (Bear Creek), MI0359 (Little Traverse), MI1481 (Boyne Falls), MI1485 (Pleasant View), and MI1506 (Springvale)
Benchmark Filings to Support Cable Programming Service Prices	

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1995; Released: April 17, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on May 27, 1994.[11]

5. On June 9, 1994, the local franchising authorities ("LFAs") for the City of Harbor Springs, Michigan (CUID No. MI0126), the Township of Resort, Michigan (CUID No. MI0294), the Township of Bear Creek, Michigan (CUID No. MI0357), the Township of Little Traverse, Michigan (CUID No. MI0359) and the Township of Pleasant View, Michigan (CUID No. MI1485) filed identical motions captioned as a "Request For Default and To Supplement the Record." On June 10, 1994, the LFAs for the City of Boyne, Michigan (CUID No. MI0047), the City of Charlevoix, Michigan (CUID No. MI0048) and the City of

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

East Jordan, Michigan (CUID No. MI0049) filed similar motions. On June 21, 1994, Operator responded to the motions filed by the Townships of West Traverse, Little Traverse and Pleasant View by filing three almost identical motions captioned as "Motion To Strike and Opposition To Request for Default and To Supplement the Record."

6. The LFAs request that we find Operator in default for its failure to file and serve timely and proper responses to their rate complaints. The LFAs state that Operator filed its rate justifications late, in an incomplete fashion and not on the proper form. They also state that in February 1994, Operator began charging a home wire maintenance fee which is not reflected in its rate justification filings. Operator responds by stating the Commission's Rules do not contemplate the filing of motions and Operator requests that the Commission disregard the LFAs' motions.

7. In response, we note that on May 27, 1994, Operator did file its rate justifications on the proper form within the "window of opportunity" established in our May 23, 1994 Order.[12] We also note that while Operator may have filed its rate justifications in an untimely fashion, Operator does not claim an Inflation Adjustment Factor for any franchise area that exceeds what it could have claimed if it had timely filed. The wire maintenance fee issue is addressed below. Accordingly, we grant in part and deny in part the LFAs' and Operator's motions.

8. For the franchise areas designated by CUID Nos. MI0040, MI0126, MI0294, MI0295, MI0296, MI0357, MI0359, MI1485 and MI1506, Operator asserts that its monthly CPS tier price of $10.44 per subscriber is justified by its benchmark filings because its price is less than the maximum permitted charge of $10.54 as calculated in its amended filings. For the franchise areas designated by CUID Nos. MI0047, MI0049 and MI1481, Operator asserts that its monthly CPS tier price of $11.74 per subscriber is justified by its benchmark filings because its price is less than the maximum permitted charge of $11.80 as calculated in its amended filings. For the franchise areas designated by CUID Nos. MI0048 and MI0264, Operator asserts that its monthly CPS tier price of $11.74 per subscriber is justified by its benchmark filings because its price is less than the maximum permitted charge of $11.77 as calculated in its amended filings. Upon review, however, we have determined that Operator has not correctly calculated its maximum permitted prices and it is therefore appropriate to make the following adjustments to Operator's calculations in its amended Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[13] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[14] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[15] When completed correctly Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operator, however, has not properly completed Part III of its FCC Form 393s and thus has not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III Operator has not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B it has not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operator's Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operator makes in its Schedule B Analyses, however, indicate that its own employees performed customer equipment installation and maintenance.

c. Not only are Operator's Schedule B allocations inconsistent with not having any maintenance facility costs, its allocations are also inconsistent with the argument that the repair of converters and remotes was performed off premises by a third party. If this statement were true, then there should be an allocation for the cost of third-party or contract labor. Operator's Schedule B Analyses, however, do not allocate any contract labor to customer equipment installation and maintenance.

d. Operator has included on its Schedule B Analyses entries for "Converter Maintenance."[16] These entries, however, further indicate that Operator has not fully unbundled its equipment costs from its regulated service costs. In its Part III, Step C, Line 9 explanations, Operator sets forth the number of hours it devoted to maintenance and service of remotes and converters.[17] The numbers of hours Operator allocates to maintenance and service of remotes and converters are inconsistent with the converter maintenance costs it reports. Even assuming that its converter mainten-

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12 *Id.*

13 47 U.S.C. § 543(b)(3).

14 47 C.F.R. § 76.923(b).

15 Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

16 For CUID Nos. MI0040, MI0126, MI0294, MI0295, MI0296, MI0357, MI0359, MI1485 and MI1506, Operator reports $5,891.60 for Converter Maintenance. For CUID Nos. MI0047, MI0049 and MI1481, Operator reports $2,863.27 for Converter Maintenance. For CUID Nos. MI0048 and MI0264, Operator reports $2,116.04 for Converter Maintenance.

17 For CUID Nos. MI0040, MI0126, MI0294, MI0295, MI0296, MI0357, MI0359, MI1485 and MI1506, Operator reports 547 hours as the total number of maintenance and service hours for remotes and converters. For CUID Nos. MI0047, MI0049 and MI1481, Operator reports 266 hours as the total number of maintenance and service hours for remotes and converters. For CUID Nos. MI0048 and MI0264, Operator reports 197 hours as the total number of maintenance and service hours for remotes and converters.

ance entries are intended to represent only Operator's labor costs, these entries mean that Operator incurred a contract labor cost of only about $10.77 per hour.[18] However, on Line 5, Step A, Part III, Operator calculates its own Hourly Service Charge ("HSC") to be approximately $27.24.[19] The hourly labor charge that Operator states that it incurred for the maintenance and service of remotes and converters does not equal even half of its own HSC. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and convertors.[20] Thus, Operator's converter maintenance entries cannot represent all of Operator's converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operator has not included on Form 393, Part III.[21]

e. Operator has not justified its Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[22] Simply put, Operator cannot be permitted to delay subscriber refunds by failing to provide information thatis needed to determine a maximum permitted rate. Since Operator has not justified its Part III allocations and has not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operator's Part II, Worksheet 3, Line 303 entry should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[23] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operator must have incurred more installation and customer equipment costs than it reported, and we have therefore revised its entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[24] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

f. Because Operator has failed to demonstrate that its prices for the CPS tier were not unreasonable, we will set maximum permitted prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which Operator filed.[25] On its amended Form 393s, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates, of 1.030.

9. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the period in question. Operator's showing justifies the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[26]

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[18] According to Operator, for CUID Nos. MI0040, MI0126, MI0294, MI0295, MI0296, MI0357, MI0359, MI1485 and MI1506 it incurred a contract labor cost of $10.77 per hour. For CUID Nos. MI0047, MI0049 and MI1481, the reported cost was $10.76 per hour, and for CUID Nos. MI0048 and MI0264 it was $10.74 per hour.

[19] For CUID Nos. MI0040, MI0126, MI0294, MI0295, MI0296, MI0357, MI0359, MI1485 and MI1506, Operator calculates a HSC of $27.24. For CUID Nos. MI0047, MI0049 and MI1481 Operator calculates a HSC of $27.23, and for CUID Nos. MI0048 and MI0264 Operator calculates a HSC of $27.21.

[20] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19 -20 (Cab. Serv. Bur., released Feb. 7, 1995).

[21] We also note that Operator has failed correctly to gross-up its taxes on Schedules A and C. Furthermore, if Operator is charging a wire maintenance fee, as it is charging in other Michigan franchise areas it serves, we would expect to see these costs reflected in Operator's rate justification filings. Both of these facts provide additional evidence that Operator has not fully unbundled its equipment costs from its programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operator's permitted rates that may be caused by these errors.

[22] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[23] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur., released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[24] Specifically, on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301 we have entered the following revised figures: for CUID Nos. MI0040, MI0126, MI0294, MI0295, MI0296, MI0357, MI0359, MI1485 and MI1506 we have entered $11,108.40; for CUID Nos. MI0047, MI0049 and MI1481 we have entered $4,393.20; and for CUID Nos. MI0048 and MI0264 we have entered $3,062.69.

[25] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[26] This finding is based solely on the representations of Operator and the modifications described herein. Should information

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the LFAs' and Operator's motions ARE GRANTED IN PART AND DENIED IN PART.

11. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[27] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[28]

15. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MI0040	11/2/93	11/29/93
MI0047	11/1/93	10/26/93
MI0048	10/23/93	10/19/93
MI0049	10/26/93	10/22/93
MI0126	9/30/93	9/27/93
MI0264	2/28/94	2/25/94
MI0294	10/6/93	9/27/93
MI0295	11/1/93	10/27/93
MI0296	12/6/93	11/30/93
MI0357	9/25/93	9/28/93
MI0359	10/25/93	10/20/93
MI1481	12/8/93	11/22/93
MI1485	10/4/93	9/28/93
MI1506	2/28/94	2/25/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
MI0040	$10.44	$9.99
MI0047	$11.74	$11.45
MI0048	$11.74	$11.45
MI0049	$11.74	$11.45
MI0126	$10.44	$9.99
MI0264	$11.74	$11.45
MI0294	$10.44	$9.99
MI0295	$10.44	$9.99
MI0296	$10.44	$9.99
MI0357	$10.44	$9.99
MI0359	$10.44	$9.99
MI1481	$11.74	$11.45
MI1485	$10.44	$9.99
MI1506	$10.44	$9.99

come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[27] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[28] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Central Florida	CUID Nos.
Altamonte Springs, Florida	FL0462 and FL0495
Seminole County, Florida	

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 12 , 1995; Released: April 17, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price TCI of Central Florida ("TCI") was charging for its cable programming service ("CPS") tier in Altamonte Springs, Florida, CUID No. FL0462 and in Seminole County, Florida, CUID No. FL0495. TCI has chosen to attempt to justify its price through a benchmark showing on FCC Forms 393. This Order addresses the reasonableness of TCI's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints were completed and served on TCI on September 7, 1993 for CUID No. FL0462 and on September 13, 1993 for CUID No. FL0495. The Commission received the complaints on September 13, 1993 for CUID No. FL0462 and on October 13, 1993 for CUID No. FL0495.

5. TCI attempted to justify its CPS price by filing identical FCC Form 393s for both franchise areas on November 30, 1993. TCI amended its justifications on May 31, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

III. DISCUSSION

6. In its amended benchmark filing of May 31, 1994, TCI calculated a maximum permitted price for the CPS tier of $10.82 per month. However, TCI's actual price for the CPS tier in each franchise area was $11.09 per month. Thus, TCI has failed to demonstrate that its price for the CPS tier in each franchise area was not unreasonable. Furthermore, upon review of TCI's submission we have found that it has not correctly calculated its maximum permitted price and it is therefore appropriate to make the following adjustments to TCI's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, TCI did not correctly account for its income tax expense. By placing entries in these columns, TCI confirms that it is a tax-paying entity (i.e., a "C" corporation). However, TCI incorrectly

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in TCI's price for the period after May 14, 1994 may be required to reflect the fact that TCI's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Because TCI has failed to demonstrate that its price for the CPS tier was not unreasonable, we will set a maximum permitted price for this tier, incorporating the adjustment discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which TCI filed.[13] On its amended Form 393, TCI calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date TCI used in justifying its rates, of 1.030.

7. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.82 (as TCI calculated) to $10.78.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that TCI's showing supports a maximum reasonable CPS tier price of $10.78 per month (plus franchise fee) for the period September 13, 1993 to May 14, 1994 in CUID No. FL0462 and for the period October 13, 1993 to May 14, 1994 in CUID No. FL0495.[14] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that for the period after May 14, 1994, TCI must reflect in its Form 1200 rate filing for the franchise areas addressed in this Order the fact that TCI's price during the earlier period was unreasonable.[15] We reserve the right to make further adjustments to TCI's price for the period after May 14, 1994, upon completion of our review of TCI's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 7, 1993 complaint for CUID No. FL0462 and the September 13, 1993 complaint for CUID No. FL0495 against the cable programming service price charged by TCI of Central Florida in Altamonte Springs and Seminole County, Florida, CUID Nos. FL0462 and FL0495, and all other complaints in these franchise areas relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filings submitted by TCI of Central Florida with respect to Altamonte Springs, Florida, CUID No. FL0462, for the period of September 13, 1993 to May 14, 1994 and Seminole County, Florida, CUID No. FL0495, for the period of October 13, 1993 to May 14, 1994, justify a maximum price of $10.78 per month (plus franchise fee) for TCI of Central Florida's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that TCI of Central Florida shall refund to subscribers that portion of the amounts paid for cable programming service from September 13, 1993 to May 14, 1994, for CUID No. FL0462 and from October 13, 1993 to May 14, 1994, for CUID No. FL0495, that exceeded $10.78 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.[16]

13. IT IS FURTHER ORDERED that TCI of Central Florida shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that TCI of Central Florida shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Altamonte Springs and Seminole County, Florida, CUID Nos. FL0462 and FL0495, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price (plus franchise fee).

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[12] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[14] This finding is based solely on the representations of TCI listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.!

[15] We reviewed TCI's Form 1200 rate filing and confirmed that TCI calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. §76.961(b).

15. IT IS FURTHER ORDERED that TCI of Central Florida shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Altamonte Springs and Seminole County, Florida franchise areas, CUID Nos. FL0462 and FL0495, that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable Manhattan — CUID No.
New York, New York — NY0104 Manhattan

Petition for Stay of Bureau Action
in Benchmark Rate Order DA 95-250

ORDER

Adopted: April 12, 1995; Released: April 12, 1995

By the Chief, Cable Services Bureau:

1. On March 13, 1995, Paragon Cable Manhattan (Paragon) filed with the Commission a Petition for Stay of Enforcement Pending Reconsideration. The Cable Services Bureau (Bureau) released, on February 17, 1993, an order finding several errors in Paragon's rate justification filing on FCC Form 393, and made adjustments that resulted in a lowering of Paragon's maximum permitted rate to a level that produced refund liability.[1] The Bureau directed Paragon to propose a refund plan, and to adjust its FCC Form 1200 and its current rates to reflect these findings. 47 C.F.R. §§ 76.922(b)(4)(C), 76.957. In addition to its petition for stay, Paragon has filed a Petition for Reconsideration of the *Manhattan Order*. Paragon argues, in its petition for stay, that it will be irreparably harmed if the Bureau does not stay the enforcement of the *Manhattan Order* pending the resolution of Paragon's petition for reconsideration.

2. In its petition for stay, Paragon asserts that it is likely to prevail on the merits in its reconsideration petition; that it will be irreparably harmed absent a stay; that others will not be harmed if a stay is granted; and that the public interest will be served by the grant of a stay. Paragon's assertion of irreparable harm is based on the Commission's instruction to refund some $1 million to subscribers, and to reduce CPS prices prospectively by some 68 cents per subscriber per month, and upon the likelihood that, should Paragon prevail on the merits of its petition for reconsideration, these funds would be unrecoverable. Paragon also notes that if a stay were granted and Paragon did not prevail on reconsideration, refunds would be paid with accrued interest, at no harm to subscribers.

3. No party has opposed Paragon's petition for stay. We find that Paragon could suffer irreparable harm if it were required to comply with the requirements of the *Manhattan Order* during the pendency of its petition for reconsideration, since it appears that expenditures made in such compliance could be unrecoverable. Because the equities argue for a stay of enforcement, and there is no harm to subscribers or to any other party from such a stay, we need not reach the question of the likelihood of Paragon's success on the merits of the issues it raises on reconsideration. We will accordingly grant Paragon's request for stay of the *Manhattan Order* until such time as Paragon's petition for reconsideration of that order is resolved.

4. Accordingly, IT IS ORDERED, pursuant to Sections 0.321, 1.41, and1.44(e) of the Commission's rules, 47 C.F.R. §§ 0.321, 1.41, and 1.44(e), that the Petition for Stay of Enforcement Pending Reconsideration filed by Paragon Cable Manhattan for CUID No. NY0104 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Paragon Cable of Manhattan, Memorandum Opinion and Order, DA 95-250 (Cab. Serv. Bur.), released Feb. 17, 1995 (*Manhattan Order*). The adjustments included modification of Paragon's showings regarding franchise fees, and an adjustment of the inflation factor. The reduction in price was from Paragon's calculated $9.09 per subscriber per month, to the Bureau's calculation of $8.41.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Petition of Time Warner Cable — CSR-4108-A
Harris County, TX
Ft. Bend County, TX
Brazoria County, TX

For Modification of ADI
Station KHSH, Alvin, TX

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1995; Released: June 22, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Before the Commission is a petition for special relief filed by Time Warner Cable ("Time Warner" or "operator") seeking to modify the Houston, Texas "area of dominant influence" ("ADI") and to exclude itself from KHSH's television market.[1] Silver King Broadcasting of Houston, Inc. ("Silver King"), licensee of television station KHSH-TV (Ch. 67-Ind.), Alvin, Texas, filed an opposition to the petition to which Time Warner replied. Silver King also filed a motion for expedited and consolidated action, which Time Warner opposed, along with a reply to the opposition. Time Warner then filed a motion to strike the reply to opposition filed by Silver King. Subsequent to these pleadings, Time Warner filed several letters from local franchising authorities which support its petition for special relief and Silver King filed a response to these supplemental filings.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from suchstation's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

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[1] The particular communities affected by this petition include Bellaire (TX 0302); Bunker Hill Village (TX 0399); Hedwig Village (TX 0410); Hunters Creek Village (TX 0415); Hilshire Village (TX 0401); Jersey Village (TX 0622); Meadows (TX 0534); Missouri City (Harris -- TX 0613); Missouri City (Ft. Bend -- TX 0614); Piney Ft. Village (TX 0459); Southside Place (TX 0396); Spring Valley (TX 0400); Stafford (TX 0616); West University Place (TX 0395); Harris County (TX 0621); and Meyerland (0676) (collectively known as the "communities").

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Broadcast Signal Carriage Issues* , 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headed of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headed of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition for special relief, Time Warner "requests that the KHSH market be modified so as to relieve [it] from any obligation to carry that station on the System" which serves communities located in Harris, Ft. Bend, and Brazoria Counties, Texas.[11] Time Warner believes that it "should be granted relief from mandatory carriage" of KHSH because the station does not provide local programming to the communities in question and fails to satisfy any of the four market factors set forth in the 1992 Cable Act and the Commission's rules.

9. With regard to the historical carriage factor, the operator asserts that KHSH has never been carried on the system although it has been on-the-air since 1986. The operator states that the system would have voluntarily carried KHSH if its subscribers so demanded. Second, petitioner alleges that KHSH does not provide local service to the relevant communities. Specifically, KHSH broadcasts home shopping programming that is almost exclusively without any focus on interests and issues involving the Houston area.[12] Time Warner adds that the non-shopping programs the station does air are short segment "fillers" found between sales presentations or are programs broadcast primarily on Sunday mornings when viewing is at a

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id.* and n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.
[11] Time Warner notes that this petition is to modify the market of KHSH's home county, Brazoria County, to the extent that the system serves communities in that county.
[12] According to Time Warner, the station does not publish and will not provide a programming schedule. Therefore, the operator has used the information available in KHSH's "Issues/Program Quarterly Report" and "Children's Programming Quarterly" found in the station's public file to investigate KHSH's public affairs programming.

minimum. In addition, these programs are nationally syndicated and neglect local issues ofx importance to the community. The operator also notes that, Alvin, KHSH's city of license, is not physically proximate to many communities served by the cable system; in this regard, Time Warner asserts that the 35 mile zone for Alvin, Texas does not cover approximately one-half of Harris County (including the communities of Jersey village, Cypress, Humble, Spring, and Tomball). Referring to the third factor, Time Warner states that several Houston area ADI stations, which have been carried for several years on the cable system, provide extensive local programming throughout each programming day.[13] Time Warner also mentions that it meets local community concerns through its carriage of educational and public access channels as well as the Weather Channel. Finally, the operator alleges that KHSH has insignificant viewing in the area, with the July 1993 Nielsen Report showing that KHSH did not meet the minimum reporting standards to be considered a part of the Houston market.

10. In opposition, Silver King first asserts that Time Warner is abusing the Commission's processes by "pursuing piecemeal destruction of home shopping stations' must carry rights through petitions which seek to evade its obligation to carry individual home shopping stations.[14] Silver King argues that the motivation behind these petitions is to eliminate any competition that may affect Time Warner's own cable home shopping service. Silver King also believes that Time Warner has impermissibly singled the station out for different treatment from all other Houston area stations by purposefully avoiding compliance with the 1992 Cable Act's must carry objectives vis-a-vis KHSH.

11. With regard to past cable carriage, Silver King argues that this factor is not controlling in market deletion cases because the 1992 Cable Act would have accomplished nothing more than maintaining the *status quo* with respect to weaker stations which cable systems had previously declined to carry. To rebut Time Warner's lack of public interest programming claim, Silver King notes that it produces a local four and one half minute public service program called "IN YOUR INTEREST" which KHSH airs once per hour 24 hours per day (except Sunday mornings) and it also broadcasts specialized children's fare and religious programming during certain dayparts. Moreover, Silver King states that the Commission has found that home shopping generally serves the public interest and Time Warner's objections do not support a change in this conclusion. Silver King also asserts that the operator fails to: (1) demonstrate that programs are worthy ofCommission consideration only if they are half-hour programs; (2) submit any information which suggests that KHSH does not address a particular significant community issue or has otherwise abused its discretion; and (3) provide any support for its suggestion that stations' public service programming may be considered for purposes of mandatory carriage qualification only if the station produces it. On this last point, Silver King notes that other Houston stations whose programming Time Warner praises also carry large amounts of network and syndicated non-local programming. Silver King also asserts that the physical distance between the KHSH and the cable communities is not determinative because, if this were a controlling factor, Time Warner would not be required to carry any Houston market station more than 35 miles away. As for other stations serving Houston, Silver King maintains that KHSH is carrying more public service programs than at least two other independent UHF commercial stations in the Houston market yet Time Warner is apparently carrying those stations. With respect to viewership, Silver King asserts that it would be contrary to First Amendment principles to base must carry rights on the popularity of particular stations as Time Warner would like the Commission to do. Silver King concludes by asking the Commission to deny Time Warner's petition and order the operator to commence carriage of KHSH within 45 days of the Commission's decision.

12. Soon after Silver King filed its opposition, it submitted a motion for expedited and consolidated action. In this pleading, Silver King asks the Commission to promptly resolve and deny petitions filed by cable operators who are evading their obligation to carry home shopping stations in their ADI.[15] Silver King asserts that because the filing of ADI modification petitions preserves the *status quo* with respect to broadcast stations' signal carriage, any delay in acting on them "thwarts" full implementation of the Commission's will as expressed in the *Home Shopping Report and Order*.[16] Moreover, Congress expressly forbade cable systems from manipulating market modification procedures to defeat the public interest purposes of mandatory cable carriage and emphasized that cable systems cannot use the market modification procedures to avoid mandatory carriage obligations. Silver King concludes by stating that the cable operators' petitions "attempt to end-run the *Home Shopping Report and Order* by abusing the Commission's special relief procedures" and they should not be permitted to succeed.

13. In its reply, Time Warner counters the arguments presented by Silver King in both its opposition to the petition for special relief and its motion for expedited and consolidated action.[17] With regard to Silver King's argument about the "piecemeal destruction of home shopping station must carry rights," Time Warner responds by stating that neither Congress nor the Commission has precluded the filing of a market modification petition where, as here, a particular station does not provide local service to certain cable communities. As for Silver King's discrimi-

[13] The local stations carried by the System include: KPRC (Ch. 2-NBC); KVHT (Ch. 8-PBS); KRIV (Ch. 26-FOX); KHOV (Ch. 11-CBS); KTRK (Ch. 13-ABC); KTXH (Ch. 20-Ind.); KHTV (Ch. 39-Ind.); KTFH (Ch. 49-Ind.); KXLN (Ch. 45-Ind.); and KTMD (Ch. 48-Ind.).

[14] Silver King notes that Time Warner has filed at least eight petitions "seeking to evade mandatory carriage of home shopping stations."

[15] Silver King asks the Commission to consolidate two other market modification petitions filed by Time Warner, and its subsidiary, Paragon Cable, into this proceeding: CSR-4105-A, which asks for modification of the Tampa Florida ADI vis-a-vis station WBHS, and CSR 4112-A which asks for modification of the Cleveland, Ohio ADI vis-a-vis station WQHS. Stations WBHS, WQHS, and KHSH are all licensed to Silver King.

[16] *See Home Shopping Station Issues*, 8 FCC Rcd 5321, 5327 (1993), *reconsideration pending*.

[17] Time Warner notes that Silver King's motion for expedited consideration should be dismissed as moot because Congress has already directed the Commission to grant expedited consideration to market modification petitions.

nation claim, Time Warner states that according to Congress, cable operators may not discriminate between stations licensed in the same community but since KHSH is the only station licensed to Alvin, Texas, a community distant from Houston, this admonition is inapplicable.[18] Time Warner also states that its system does not carry any home shopping station which would compete against KHSH; moreover, it decided to drop a cable home shopping service, which it held a minority interest in, to accommodate the request of a broadcast must carry signal.

14. As for Silver King's arguments regarding the inapplicability of the historical carriage factor in deletion cases, Time Warner argues that nothing in the 1992 Cable Act indicates that certain factors are to be used only in considering a petition to add, but not one to delete, a community. Time Warner also argues that, contrary to Silver King's assertion, the 35 mile zone is clearly relevant under the second statutory factor to show the proximity of the station and thus the likelihood of local coverage and service. The operator reiterates that KHSH's weekly programming demonstrates very little commitment to covering events and issues of local interest to the communities served by the system. In this regard, Time Warner also argues that Silver King has not demonstrated how the syndicated children's and religious programming which airs on Sunday mornings serves particularized local interests. As for the provision of local programming by other area stations, the operator argues that this statutory factor is relevant to the analysis because it allows specific communities to be excluded from the ADI of a station which provides little or no local service to those communities in comparison to local programming available from other stations carried by the cable system. Time Warner also contends that Silver King can not and does not dispute the fact that KHSH has no reportable ratings. Because the station has no significant viewership, carriage of the station would do nothing to further the statutory goals of local programming service.

15. In its reply to Time Warner's opposition to the motion for expedited and consolidated action, Silver King reiterates that prompt Commission action is necessary to ensure that home shopping stations have mandated access to the audience they are obligated to serve. With regard to its public service programming, Silver King argues that the operator does not refute that its stations produce "substantially more local programming and air substantially more public service programming than many similarly situated market independent UHF stations which the operator already carries." Silver King also argues that Time Warner does not demonstrate that the stations have failed to address a significant local need or have failed to ascertain community issues. In sum, Silver King states Time Warner's "privately motivated assessment" of KHSH's format, scheduling, and promotion should not and cannot support delay in carriage of the station.

16. Time Warner subsequently filed a motion to strike Silver King's reply to opposition stating that the referenced pleading "is unauthorized, unfairly reiterates argument from its oppositions, and needlessly extends the pleading cycle." Time Warner argues that under Section 76.7(e) of the Commission's rules, its reply should have closed the pleading cycle with respect to its substantive showings under the statutory market modification proceedings. Time Warner concludes by stating that it is "ironic that Silver King, which claims to seek expedition, has burdened the Commission with a repetitive unauthorized pleading." The operator requests that Silver King's pleading should therefore be stricken.

17. Time Warner also filed with the Commission letters from the mayors of several Houston area communities which support the operator's market modification petition.[19] In response, Silver King filed a supplemental pleading arguing that these letters are irrelevant and were not accompanied by a request for leave to file them. Silver King also maintains that the submissions ignore KHSH's local programming service. In this regard, Silver King states that it is now submitting its comments in the Commission's home shopping proceeding which documents KHSH's "extensive" local public service programming record.[20] Finally, Silver King asserts that the "Time Warner-generated opinions of "individual local leaders" cannot override the Commission's determination that carriage of home shopping stations are in the public interest, particularly when those opinions have no foundation in fact and appear to be premised upon the operator's incomplete representations.

ANALYSIS AND DECISION

18. Because Time Warner has not pointed to particularized and persuasive evidence that the communities in question are not part of KHSH's market, based on the four statutory or any other relevant factors, its petition must be denied.[21] We note as a preliminary matter, that the ADI market change process incorporated into the Communications Act is not intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations, particularly in cases concerning a station's programming format, apart from the question of whether a change in the market area involved is warranted. Here the arguments presented by the petitioner are not such as assist in resolving whether a change is appropriate -- whether one community rather than another should be included or excluded from the market -- but rather appear directed more generally to whether the signal of KHSH should be carried regardless of the specific location of the cable communities.

19. KHSH is licensed to Alvin, Texas, a community in the Houston, Texas ADI, a market that encompasses some 19 counties and is more than 200 miles long. Alvin is

[18] Time Warner also notes that it did not single out KHSH for disparate treatment because it also seeks to modify the market of KRTW, Baytown, Texas, an old religious television station which now broadcasts home shopping programming.3

[19] Letters were received from the following Houston area communities: Missouri City, Bunker Hill Village, Piney Point Village, West University Place, Meadows, Stafford, Hilshire Village, Spring Valley, and the city of Houston.

[20] Silver King also includes a supplement to that submission which updates its programming record.

[21] Because we may reach a conclusion based on the arguments presented in the pleadings filed in the official pleading cycle (*i.e.* petition for special relief, opposition, and reply) we need not address the repetitive arguments found in the supplemental material filed by the parties. We also decline Silver King's invitation to consolidate this proceeding with other petitions Time Warner has filed to delete WBHS from the Tampa-St. Petersburg, Florida television market and WQHS from the Cleveland, Ohio television market because we judge the merits of market modifications on an individual basis.

approximately 13 miles south of Houston well within the Houston metropolitan statistical area and near the core of the Houston television market. The station's transmitter, is located about 18.5 miles northwest of Alvin in the center of the city of Houston. The station places a Grade A service contour over the Houston area. The Time Warner cable system serves Houston itself, as well as a number of surrounding communities that are the subject of this request.[22] Given these facts and the general structure of the market it appears at the outset that KHSH is logically part of this ADI as are the cable communities in question.

20. Focusing on the specific factors referenced in the statute, we are unable to conclude that any of Time Warner's argument distinguish these cable communities from the rest of the market. With respect to the question of historical carriage patterns, Time Warner states that it has not carried the signal of KHSH since the station began broadcasting because it has aired home shopping programming. We agree with Silver King that the historical carriage factor is not controlling these circumstances because the 1992 Cable Act would, in effect, prevent weaker stations which cable systems had previously declined to carry, from ever being carried. Thus, we find that carriage history is of little assistance in determining the correct scope of the market because it provides no basis for distinguishing communities in the ADI.

21. We also find that Time Warner has failed to demonstrate that KHSH does not provide local coverage or service. The fact that KHSH places a Grade A and indeed a City Grade signal over Houston and the neighboring communities where Time Warner's subscribers are located is persuasive evidence that is provides service to these communities. The Commission has noted the importance of a City Grade signal in determining local coverage.[23] With regard to the content of KHSH's programming, we note that home shopping formats are not incompatible with local appeal and recognize that such specialty programming traditionally has drawn smaller audiences. In fact, the Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[24] Finally, as Silver King has pointed out, we cannot weigh the merits of a television station's format or promotional activities when resolving signal carriage complaints or modifying television markets under the special relief process.

22. We also find Time Warner's arguments regarding KHSH's lack of ratings to be unpersuasive. We recognize that home shopping stations, like religious or foreign language stations, which were once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[25] We continue to believe,!as we did then, the fact that such stations attract a smaller audience share must be taken into account in determining the equities concerning a station's right to cable carriage. Further, no evidence is before us in this proceeding that would permit us to distinguish these communities from the rest of the communities in the market through the use of ratings data.

23. Finally, we do not believe that Time Warner's carriage of other local stations is sufficient to justify exclusion of its system from the above referenced communities.[26] Time Warner has not sufficiently demonstrated why it is necessary to remove itself from its own ADI, vis-a-vis KHSH, yet remain in the same market with regard to the station's competitors.[27] We find that Time Warner's Petition is inconsistent with Congressional intent which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must carry obligations.[28] This is particularly notable in this instance where Time Warner admits that it is carrying most other television stations in the Houston market except for KHSH.

ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to Section 614(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's Rules, 47 C.F.R. § 76.59, that the "Petition for Special Relief" (CSR-4108-A) filed September 30, 1993 by Time Warner Cable IS DENIED. Time Warner Cable is therefore required to carry the signal of KHSH-TV on its systems serving the afformentioned communities. Silver King Broadcasting of Houston, Inc. shall notify Time Warner in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days ofthe release date of this *Memorandum Opinion and Order*. Time Warner shall come into compliance with the applicable rules within 60 days of such notification.

25. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[22] The specific communities involved are listed in the caption to the special relief request and are listed in footnote 1 above. Houston itself is not among the communities named by Time Warner as being involved in the request.

[23] *See In Re Applications of PZ Entertainment Partnership, L.P.*, 6 FCC Rcd 1240, 1243 at para. 13 (1991). *See also* 47 C.F.R. §73.685.

[24] *See* 8 FCC Rcd at 5327.

[25] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[26] That other ADI licensees do in fact provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

[27] We note that subsequent to the filing of this petition, Time Warner rescinded its market modification petition to exclude home shopping television station KRTW from the Houston ADI. See note 18 above. This development strengthens Silver King's discrimination argument because the operator is, by default, singling KHSH out from all other area stations.

[28] H.R. Rep. No. 102-628, 102d Cong. 2nd Sess. at 97.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Time Warner Cable	CSR-4131
Tehachapi, California	CA 1454

Network Nonduplication
Petition for Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1995; Released: June 22, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("TWC"), has filed the captioned "Petition For Declaratory Ruling" regarding application of the cable television network nonduplication rules to its cable television system serving Tehachapi, California. KGET TV, Inc., licensee of Television Broadcast Station KGET (NBC, Channel 17), Bakersfield California, filed an opposition.

PARTIES' ARGUMENTS

2. On June 3, 1993, KGET requested network nonduplication protection from TWC against any NBC affiliate outside the Bakersfield ADI, including Station KNBC-TV (NBC, Channel 4), Los Angeles, California, stating that "Tehachapi is located in Kern County West, which is part of the Bakersfield ADI." A letter dated August 30, 1993 to the President of TWC, Bill Grinstead, from an Arbitron Account Executive, George E. Brady, stated that "Tahachapi was added to the Bakersfield ADI beginning with the November 1991 report. * * * * From the November survey up through the current and future surveys, it will be included in the Bakersfield ADI."

3. In its petition, TWC requests that the Commission issue a ruling that KGET is not entitled to network nonduplication protection on TWC's system at Tehachapi against KNBC-TV. According to TWC, the system serving Tehachapi has been transmitting KNBC-TV since 1964, when the system first commenced operations. TWC notes that Arbitron splits Kern County into Kern County East and Kern County West. KNBC-TV, it is noted, was been found by the Commission to be "significantly viewed" in Kern County East, when it devised the list of significantly viewed signals that is incorporated into the rules.[1] Because TWC's cable system was located in Kern County East for purposes of the list of significantly viewed signals, it maintains that KNBC-TV is exempt from any deletion requests made by local NBC affiliates on cable systems there, pursuant to that provision of the rules which exempts significantly viewed signals from being deleted.[2] TWC asserts that Arbitron's reassignment of the City of Tehachapi to Kern County West in the Bakersfield ADI from Kern County East in the Los Angeles ADI is irrelevant as to KNBC-TV's significantly viewed status in Tehachapi. TWC clams that grant of KGET's network nonduplication request would effectively delete KNBC-TV from the Commission's list of significantly viewed signals for Kern East, without following the procedures delineated in the Commission's prior decision in *KCST-TV, Inc.*[3] It asks that the Commission note that KGET is not claiming that KNBC-TV is no longer significantly viewed in Tehachapi, but merely that the community is now considered by Arbitron to be part of Kern County West. Therefore, TWC requests that the Commission issue a ruling, that KGET is not entitled to network nonduplication protection against KNBC-TV on TWC's system at Tehachapi.

4. In response, KGET notes that "Tehachapi was included in Kern County East when the Commission adopted Appendix B to Section 76.54 . . ." but it argues that the basis for denying network nonduplication to KGET no longer exists since "Tehachapi is no longer a part of Kern County East . . . ." In support of this assertion, KGET submits a letter dated August 24, 1993 from Nielsen Account Executive David G. Avalos stating that "Bakersfield is listed as the designated market area for Tehachapi."[4] According to KGET, therefore, ". . . the cable system serving Tehachapi must accord network nonduplication protection to KGET based upon Tehachapi's current county and ADI designation, not its prior designation."

DISCUSSION

5. The crux of the issue before us is whether KGET is correct in its belief, asserted in its request for nonduplication protection, that Arbitron's 1991 reassignment of the City of Tehachapi, California to Kern County West or to the Bakersfield ADI invalidates the Commission's finding, incorporated into Section 76.54(a) of the rules, that KNBC is significantly viewed in the western portion of Kern County, California, including Tehachapi. KGET's belief is unfounded. The significantly viewed status of a television station is not determined by the application of Arbitron's ADI assignments nor by changes subsequent to the survey from which a station's significantly view status was determined. Further, in this instance, KGET has presented no showing, or even an argument, that KNBC-TV is no longer significantly viewed off-air in Tehachapi. *See, KCST-TV, Inc., supra.*

6. When the Commission adopted the significantly viewed exception to the network nonduplication rule, it explained that it had been concerned about deletion of programs on stations that subscribers could receive off-air ever since it drafted its first network nonduplication rules in 1963. The Commission added that it was attempting to balance its traditional concern regarding economic impact to local broadcasters against its concern that stations be

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1 Section 76.54(a)
2 Section 76.92(f).
3 103 FCC 2d 407, 413 (1986).
4 Neither the ADI boundaries nor the viewing surveys in question are derived from the Nielsen organization. Nielsen information, however, is included as reflecting decisions analogous to those of Arbitron.

available in full on cable systems serving communities where they are available off-air, and it concluded that in future waiver cases, ". . . the burden has now shifted to the broadcast licensee seeking nonduplication protection against a significantly viewed signal. A petitioning licensee will be expected to present persuasive justification . . . . this shifts the burden to the party possessing the licensee financial information."[5] In this instance, KGET has presented no such financial data. The only assertion made by KGET is that, Arbitron decided in 1991 to move Tehachapi from the Los Angeles ADI (or Kern County East). According to Mr. Brady's letter ". . . based upon station proposals to have it added to the Bakersfield ADI." Arbitron announced that it would consider Tehachapi as part of the Bakersfield ADI (or Kern West), rather than Kern County East. This decision in no way affects any of the Commission's pre-existing policies or holdings, or its prior consideration of Tehachapi as part of Kern East for purposes of the application of the network nonduplication rules, and in particular the significantly viewed exception in Section 76.92(f) of the Rules.

ORDERING CLAUSES

7. In view of the foregoing, we find that grant of TWC's petition is in the public interest.

8. Accordingly, IT IS ORDERED, pursuant to Section 76.7 of the Commission's Rules, that the petition for declaratory ruling (CSR-4131), filed October 13, 1993, by Time Warner Cable, a division of Time Warner Entertainment Company, L.P. IS GRANTED.

9. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[5] *Memorandum Opinion and Order* in Docket No. 19995, 67 FCC 2d 1303 (1978), *granting recon. of*, 62 FCC 2d 99 (1976), *stay granted in part*, 68 FCC 2d 1308 (1978), *recon. denied*, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. FCC*, 619 F. 2d 314 (4th Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Robin Cable Systems, L.P., d/b/a Palmetto Cablevision — CSR-4083

Network Nonduplication Waiver Request

]MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1995; Released: June 22, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Palmetto Cablevision ("Palmetto"), operator of various South Carolina cable television systems,[1] has filed a "Petition For Special Relief," seeking exemption from the Commission's network nonduplication rules insofar as its carriage of the following television broadcast stations licensed to Augusta, Georgia is concerned: WJBF (ABC, Channel 6); WAGT (NBC, Channel 26); and WRDW-TV (CBS, Channel 12). Both WAGT Television, Inc., licensee of WAGT, and WRDW Associates, licensee of WRDW-TV, have filed oppositions to this petition, to which Palmetto replied.

PARTIES' ARGUMENTS

2. According to Palmetto, the above Augusta stations have all requested network nonduplication protection against the following stations licensed to Columbia, South Carolina: WOLO-TV (ABC, Channel 25); WLTX (CBS, Channel 19); and WIS-TV (NBC, Channel 10). Palmetto adds that the core community of its designated systems is Aiken, which is located approximately fifty miles from Columbia and about thirty miles from Augusta. Palmetto also notes that each of the designated headends is within the Augusta, Georgia Area Of Dominant Influence ("ADI"), as well as either within the thirty-five mile primary zone of protection of the Augusta, Georgia smaller television market or within its fifty-five mile secondary zone. Absent grant of the requested waiver, Palmetto states that it will be forced to delete the Columbia stations entirely, thus, depriving South Carolina subscribers of access to telecasts about local, in-state matters such as education, health and safety issues, political presentations, economic news, and the ever-popular telecasts of sports events, including University football and basketball. Citing prior Commission decisions in *Bishop Cablevision Company of Ashland*, 46 FCC 2d 442 (1974), and *Arlington Telecommunications Corp.*, d/b/a/ "ARTEC", 53 FCC 2d 757 (1975), Palmetto argues that the Commission has previously recognized "the interest residents have in receiving in-state programming, especially of a news and public affairs nature from their state capital." Although located closer to Augusta than to Columbia, Palmetto claims that its subscribers want access to the same programming from their State Capital as other citizens of South Carolina receive, and that when Palmetto had to drop WOLO-TV and WLTX from its Aiken headend eighteen months ago, due to network nonduplication requests from WJBF and WRDW-TV, there was "significant public outcry."[2] Palmetto also notes that WAGT has since requested protection on its Aiken, Edgefield, Barnwell, and Allendale headends, so Palmetto has now been forced to delete WIS-TV from these systems, since it states that it is not "economically feasible" for the system to continue to carry the Columbia stations if it is prevented from transmitting their network programming. Finally, Palmetto claims that grant of the waiver requested would clearly serve the public interest.

3. Citing prior decisions in *Metro Cable Co.*, 64 FCC 2d 605, 607 (1977), and in *Cooke Cablevision, Inc.*, 5 FCC Rcd 7620 (1990), WRDW-TV notes that the Commission has previously recognized that enforcement of its network nonduplication rules often causes some disruption of subscriber viewing habits. WRDW-TV adds that Palmetto has neither disputed the legitimacy of the Augusta stations' requests for nonduplication protection nor claimed that these requests were either defective or improper. In addition, Palmetto has not chosen to submit any cost-based data to support its assertion that it cannot afford to carry those portions of the Columbia stations' programming which are not subject to network nonduplication protection (such as local broadcasts of news, weather, and economic reports), nor has Palmetto chosen to submit program schedules or other data documenting the extent of the duplicating programming and the number of affected subscribers. Finally, WRDW-TV argues that, like the other Augusta stations, it is closer to the communities in South Carolina than are the in-state stations, and that it covers events of both local and regional importance to Palmetto's South Carolina subscribers.

4. Echoing this sentiment, WAGT notes that each of the five South Carolina counties where Palmetto operates cable systems borders Georgia, and that they have a total of 66,200 television households, comprising 32% of the total households in WAGT's television market. WAGT adds that there are 71,700 total South Carolina viewers in its television market, which constitute 34.6% of its total viewers; consequently, WAGT cannot afford to ignore South Caro-

[1] Among these systems, according to Palmetto, are the Aiken headend (serving portions of the Counties of Aiken and Barnwell, as well as the Cities of Aiken and Burnettown, and the Towns of Jackson and New Ellentown); the Edgefield headend (serving Edgefield County and the Towns of Edgefield and Johnston); the McCormick Headend (serving both the Town of McCormick and McCormick County); the Barnwell Headend (serving the City of Barnwell and the Town of Williston); and the Allendale headend (serving Allendale County and the Towns of Allendale and Fairfax).

[2] In Attachment 1 to its petition, Palmetto includes a letter from the Mayor of the City of Aiken, Fred B. Cavanaugh, supporting its petition and emphasizing his belief that, as the Capital of South Carolina, news from Columbia affects the residents of Aiken much more directly than does news from Augusta.

lina information, events, and news, or the station would lose a substantial portion of its viewers there. In fact, WAGT states that it consistently covers South Carolina elections, politics, and news, including the recent downsizing of the Savannah River military base in Aiken County, various horse shows and high school games in South Carolina, and recent events at the Savannah River nuclear power site. Noting that the Commission's prior decisions cited by Palmetto in *Bishop, supra,* and in *ARTEC, supra,* involved waivers ". . . to import only the *non-network programming* of distant in-state signals," WAGT states that the Commission has previously rejected requests for waiver of the network nonduplication rules which involved transmission of the entire signal of a distant in-state signal, citing the Commission's prior decisions in *King Video Cable Company,* 6 FCC Rcd 2218 (1991), and in *Chambers Cable of Oregon, Inc.,* 5 FCC Rcd 5641 (1990). WAGT adds, however, that Palmetto is perfectly free to transmit any non-network sports events, public affairs programs, or non-network news programs that originate from the South Carolina stations. However, WAGT argues that grant of the requested waiver would affect such a high percentage of its potential audience that it would substantially diminish the value of its network affiliation agreement with NBC, while simultaneously eviscerating the network nonduplication rule itself by opening the floodgates to similar waiver requests wherever a station's primary or secondary zone of protection crosses state lines.

5. In its reply to the above oppositions, Palmetto asserts that, because cable operators who afford full time carriage to network affiliates are no longer permitted to carry their network programming on a second channel, Palmetto would have either to purchase blocks of programming from a satellite programmer, or it would have to purchase individual programs from a satellite programmer in order to fill the time slots that otherwise would be empty due to the Augusta stations' nonduplication requests. Since at least 85% of the Columbia stations' weekly prime time programming is network, Palmetto claims that it would have to purchase 248 hours of additional programs just to substitute for the network programming of the three stations that it is being asked to delete. In addition, these signals would all have to be transmitted on Palmetto's basic service tier, which is now subject to benchmark and to price cap regulation, so that Palmetto would be precluded from recovering its costs if it were forced to obtain large amounts of programming to substitute for prohibited network programming, unless it risked further alienating its subscribers by raising its rates to pay for preparing an expensive cost-of-service showing. According to the First Quarter 1993 programming list provided to Palmetto by WAGT, moreover, only 9 items (out of a total of 74), or 12%, specifically related to events involving South Carolina, whereas WRDW-TV's programming lists for the first three quarters of 1993 identified a total of 22 programs that specifically related to South Carolina (out of 243 issue-response programs), or 9%. Citing *Meadville Master Antenna, Inc. v. FCC,* 443 F. 2d 282, 290 n.24 (3rd Cir. 1971), Palmetto argues that this data fails to confirm the Augusta stations' allegations of their "extensive" coverage of events and news of local interest to South Carolina viewers.[3]

DISCUSSION

6. Nothing in the record before us demonstrates that the programming which Palmetto desires to deliver to its subscribers cannot be delivered to them absent waiver. The Commission's rules do not preclude the carriage of those portions of a station's signal which would not be blacked out by the operation of the program exclusivity rules. Consequently, Palmetto may carry at its option any non-network programming from the Columbia, South Carolina--or any other--stations on Palmetto's systems. *See, King Videocable Company, supra; Chambers Cable of Oregon Inc., supra.* If Palmetto chooses not to carry the Columbia, South Carolina stations, this is its own decision. Nor has Palmetto proven that generic carriage of the Columbia, South Carolina stations is necessary to provide cable subscribers on its South Carolina cable systems with in-state programming.

7. Palmetto essentially advances three rationales to justify its requested waiver of the network nonduplication rules. Initially, it claims that, absent waiver, its systems will experience significant subscriber dissatisfaction. However, the Commission has previously recognized this problem and consistently rejected it as justification for waiver either of the syndicated exclusivity rule or of the network nonduplication rule. *See Metro Cable Co., supra; Chambers Cable of Oregon, Inc., supra; and Cooke Cablevision, Inc., supra.* Second, Palmetto argues that, without the requested waiver, its South Carolina subscribers will be deprived of in-state programming covering such essential local topics as economics, education, politics, sports, health and safety. However, as noted above Palmetto does not need a waiver to transmit any local, non-network programming produced by the South Carolina stations, provided the parties have concluded a valid retransmission consent agreement. Palmetto's third rationale is premised upon cost considerations. The system maintains that, since it wishes to avoid any additional expenses involved in presenting a cost-of-service showing, it is not "economically feasible" for it to carry the South Carolina stations' non-network programming, absent a total waiver of the network nonduplication rule. This argument is apparently based in large part on the cost of purchasing additional programming to fill in for deleted programming on the subject channels. The rules do not require that Palmetto purchase any such programming. While we recognize that Palmetto may not wish to carry blacked out portions of a network channel, this is a decision it must weigh in terms of the value of the non-network programming to its subscribers.

8. In any event, Palmetto has provided no evidence to buttress its cost assertions. Although we have abandoned our prior policy of granting waivers of the nonduplication rule premised upon a showing of lack of significant harm to local broadcast stations, we have also specifically held that ". . . cable systems may continue to avail themselves of the standard waiver procedures provided in the Commu-

[3] In support of this assertion, Palmetto submits Resolution No. 93-9-178 adopted unanimously on October 4, 1993 by the County Council for Aiken County noting that Palmetto has thus far been unable to successfully negotiate for retransmission consent with at least one of the Augusta network affiliates and stating its support for Palmetto's waiver request ". . . because of the desires of many Aiken County citizens and their need to retain their South Carolina heritage."

nications Act." *Report and Order* in Gen. Docket 87-24, 3 FCC Rcd 5299, 5339, n.243 (1988). However, "[m]ere arguments and predictions . . . are insufficient substitutes for factual information . . . including . . . detailed financial information." *Teleprompter of Quincy*, 83 FCC 2d 431, 438 (1980). Thus far, Palmetto has submitted no specific financial data; instead, it has proferred only speculation and unquantified arguments. The program exclusivity rules were designed to ". . . increase the diversity of programming options available to the public." *United Video, Inc. v. FCC*, 890 F. 2d 1173, 1181 (D.C. Cir. 1989); *Cooke Cablevision, Inc., supra*. Absent convincing evidence to the contrary, we are not persuaded that the underlying rationale of the rules will not be served by their application here, or that South Carolina programming is not available under the rules for acquisition or for carriage. In essence, Palmetto seeks our approval of its judgment that the transmission of distant, imported programming, for which local stations have obtained exclusive distribution rights, is of greater public interest value than is the creation of a more diverse and responsive communications environment. This is exactly the position considered and reject by the Commission in *Docket* 87-24, *supra*.

ORDERING CLAUSES

9. In view of the foregoing, we find that grant of Palmetto's requested waiver is not in the public interest.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, That the "Petition For Special Relief" (CSR-4083) filed September 30, 1993, by Robin Cable Systems, L.P., d/b/a Palmetto Cablevision IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-259

In the Matter of

Amendment of Section 73.202(b),	RM-7309
Table of Allotments,	RM-7942
FM Broadcast Stations.	RM-7943
(Canovanas, Culebra, Las Piedras,	RM-7944
Mayaguez, Quebradillas, San Juan,	RM-7948
and Vieques, Puerto Rico, and	
Christiansted and Frederiksted,	
Virgin Islands)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 13, 1995; Released: June 22, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the *Further Notice of Proposed Rule Making* (*"Further Notice"*), 7 FCC Rcd 3324 (1992), requesting comments on the allotment of FM channels to the various communities in Puerto Rico and the Virgin Islands listed above. Comments in response to the *Further Notice* were filed by Amor Family Broadcasting Group ("Amor"), V.I. Stereo Communications Corp. ("V.I. Stereo"), WKJB-AM-FM Inc. ("WKJB"), licensee of Station WKJB-FM, Mayaguez, Jose J. Arzuaga ("Arzuaga"), Arso Radio Corporation ("Arso"), licensee of Station WPRM-FM, San Juan, Luis Hernandez[1] ("Hernandez") and Carlos J. Colon-Ventura ("Colon-Ventura"). Reply comments were filed by Arso Radio Corporation ("Arso") and jointly by Colon-Ventura and V.I. Stereo.

BACKGROUND

2. Pursuant to the joint request of Colon-Ventura, licensee of Station WSAN, Vieques, Puerto Rico, and Arzuaga, licensee of Station WQQZ (formerly WREI), the Commission issued a *Notice of Proposed Rule Making and Orders to Show Cause* (*"Notice"*), 6 FCC Rcd 5310 (1991), proposing the substitution of Channel 252A for Channel 255B at Vieques, the reallotment of Channel 252A from Vieques to Canovanas, and the modification of Station WSAN's license accordingly, as well as the substitution of Channel 258A for Channel 252A at Quebradillas, Puerto Rico, and the modification of Station WQQZ's license to specify the alternate Class A channel. To accommodate the allotments at Canovanas and Quebradillas, the Commission also proposed the substitution of Channel 254B for Channel 256B at Mayaguez, Puerto Rico, licensed to Station WKJB-FM, and the substitution of Channel 256B for Channel 253B at San Juan, Puerto Rico, licensed to Station WPRM-FM. Because the staff had inadvertently failed to seek comments in the *Notice* on the timely filed interrelated proposal of Amor to allot Channel 251A to Santa Isabel, the Commission issued a *Further Notice of Proposed Rule Making* (*"Further Notice"*), 7 FCC Rcd 3324 (1992), requesting comments on the proposed channel allotment at Santa Isabel and the counterproposal filed by Colon-Ventura requesting the same substitution of Channel 252A for Channel 255B at Vieques but its reallotment to Las Piedras, Puerto Rico, instead of to Canovanas. Since it was necessary to issue a *Further Notice*, the Commission also requested comments on the proposals filed by V.I. Stereo, licensee of Station WVIS, Channel 291B, Christiansted, St. Croix, Virgin Islands, requesting the reallotment of its channel to Vieques, and by Hernandez requesting the allotment of Channel 253A to Frederiksted, Virgin Islands, as the community's first local aural broadcast service.[2] [3]

3. In response to the *Notice*, WKJB filed comments opposing the allotment at Canovanas and the modification of Station WKJB-FM's license. It also argued that a new *Order to Show Cause* was required in light of Colon-Ventura's counterproposal based on the belief that changing the community to which Station WSAN would be licensed changed the fundamental nature of the petition for rule making and thus the reason for modifying the licenses of Stations WKJB-FM and WPRM-FM. WKJB reasoned that the failure to provide a 30-day response period violated the due process requirement of Section 316 of the

[1] Hernandez filed timely comments in response to the *Further Notice*. As requested, he submitted an affidavit stating that the information contained in his petition is true to the best of his knowledge. He also stated his intention to reimburse the licensees of Station WPRM-FM, San Juan, and Station WKJB-FM, Mayaguez, for the costs associated with their channel changes. However, he failed to serve the petitioner and the San Juan and Mayaguez licensees with a copy of his comments, as required by Section 1.420(a) of the Commission's Rules. *See also* paragraph 4 of the Appendix to the *Notice* and *Further Notice*. Nevertheless, we note that his proposal, when originally filed, was served on the petitioner, as well as on Arso and WKJB, the two licensees affected by Hernandez' request. Further, both Arso and WKJB commented on the proposal, and the allotment can be accomplished without prejudice to any other proposal. Therefore, although the failure of Hernandez to serve comments on the petitioner and the other affected parties can be cause for dismissal of the petition, we do not believe that the public interest would be served by doing so in this case. Thus, we will consider his comments.

[2] The pleadings filed by V.I. Stereo and Hernandez were styled as counterproposals. However, since they were not mutually exclusive with the proposals set forth in the *Notice*, they were not acceptable as counterproposals. Nevertheless, because we were issuing a *Further Notice* in order to consider the Santa Isabel proposal, we believed it appropriate to also consider the inter-related proposals of V.I. Stereo and Hernandez.

[3] We note that Frederiksted has allotted to it Channel 278A for which an application filed by Carlos A. Lopez-Lay is pending (BPH-930128MB). However, since the application has not as yet been granted, and thus no station is on the air, we will consider the proposal to allot Channel 253A to Frederiksted as providing a first local aural transmission service. Should the Channel 278A application be granted and the station activated prior to the activation of Channel 253A at Fredericksted, this allotment would provide a second local aural transmission service rather than a first local aural transmission service.

Communications Act of 1934, as amended, citing *License Modification Pursuant to Section 316*, 2 FCC Rcd 3327 (1987). Upon consideration, the *Further Notice* tentatively concluded that a new *Order to Show Cause*, with its attendant 30-day response period, need not be issued to either Arso or WKJB. We stated that even though Colon-Ventura had changed its proposed community of license from Canovanas to Las Piedras, Arso and WKJB-FM would still be required to change channels and thus any disruptive effect on their operations would be the same, citing *Eddyville and Fort Madison, Iowa, and Louisiana, Missouri*, 4 FCC Rcd 7774 (1989). We also noted that, as a practical matter, both Arso and WKJB would have in excess of thirty days in which to prepare a response since they were served with a copy of the counterproposal at the same time the pleading was filed with the Commission.[4] Finally, in response to the oppositions filed by Arso and WKJB-FM regarding the modification of their licenses, we tentatively concluded that neither party had raised a substantial and material question of fact which would warrant a hearing on the modification of their station's license.

THE FURTHER NOTICE

4. In response to the *Further Notice*, Amor,[5] V.I. Stereo, Arzuaga and Hernandez each restate their intention to apply for the channels proposed in their respective petitions and reiterate their individual intention to reimburse the licensees of Station WPRM-FM, San Juan and WKJB-FM, Mayaguez, for the reasonable costs associated with the required change in their operating frequency.

5. Colon-Ventura urges the adoption of the channel allotments proposed in the *Further Notice*. He states that the substitution of Channel 252A for Channel 255B at Vieques, and its reallotment as a Las Piedras station, would provide that community with its first local aural transmission service. In addition, WSAN, within its 60 dBu contour, would realize a gain in population of 765,005 persons within an area of 960 square kilometers.[6] He goes on to state that all of the population within Station WSAN's present 60 dBu contour will be encompassed within that of the Las Piedras station with the exception of 616 people residing on the island of Vieques and all of the island of Culebra, with its population of 1,542 people. However, if the Commission modifies the license of Station WVIS to specify Vieques instead of Christiansted as its community of license, as is proposed herein, Colon-Ventura asserts that there will be no loss of service from the migration of Station WSAN. In addition, the proposed allotment scheme would provide first local aural transmission services to Santa Isabel and Frederiksted, enable the existing service at Quebradillas to be improved by allotting Channel 258A there which can be operated with full Class A power, and enable Vieques to continue to receive local aural transmission service by reallotting Station WVIS, Channel 291B, from Christiansted to Vieques. Finally, Colon-Ventura reiterates his intention to reimburse the licensees of Stations WPRM-FM and WKJB-FM for the reasonable costs associated with the change of their operating channels.

6. WKJB again argues that the failure to issue a new *Order to Show Cause* and thirty-day response time violated the due process required by Section 316 of the Communications Act. WKJB agrees that the net effect on the station will be the same regardless of whether Channel 252A is allotted to Canovanas or Las Piedras. However, it argues that this fact is not the only issue upon which it is entitled to notice and an opportunity to comment. Rather, an affected licensee is also entitled to notice of the public interest factors which support the change.[7] In this case, WKJB submits that since the proposed community has changed, the public interest supporting that change is likely to be different and it should receive notice of those facts and the Commission's assessment of the public interest benefits in order to respond. It also takes issue with the statement in the *Further Notice* that, in reality, it would have had at least thirty days in which to prepare a response to Colon-Ventura's counterproposal, noting that the counterproposal was served on WKJB by mail on November 4, with reply comments due on November 19, leaving only 15 days in which to prepare a response. Further, until formal announcement of the filing of a counterproposal, WKJB argues that it is not possible to know whether any particular proposal will pass initial Commission muster and be released for comments. Since the parties had already expended resources in responding to Colon-Ventura's original Canovanas request only to have it withdrawn, WKJB contends that it would be fruitless to expend further resources analyzing the merits of a proposal which may not have been found sufficient for notice.

7. As to the merits of the proposals under consideration, WKJB reiterates its belief that Colon-Ventura is trying to manipulate the Commission's change of community policy. WKJB acknowledges that Colon-Ventura now seeks the allotment of Channel 252A to a community outside of the San Juan Urbanized Area. However, it states that Las Piedras is located within the San Juan and Caguas Metropolitan Statistical Areas ("MSA"), with the vast majority of the increase in population served as a Las Piedras station (807,166 persons) as opposed to a Vieques station (182,054 persons) resulting from providing an additional service to the already well-served San Juan and Caguas residents. As further proof that Colon-Ventura is attempting to manipulate the Commission's rules to actually achieve a rural to urban migration, WKJB submits that the site restriction proposed for Channel 252A at Las Piedras moves the transmitter 14 miles closer to San Juan, the station must be downgraded from a Class B to A to comply with the mileage separation requirements, and finally, the population of Las Piedras is only 385 persons greater than that of Vieques (2,087 versus 1,702). However, should the Com-

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[4] Generally, the Commission issues a Public Notice within two weeks to one month following the receipt of counterproposals. The Public Notice specifies a 15 day period in which interested parties may file responses to the counterproposals.

[5] Amor, in its petition for rule making, failed to comply with Section 1.52 of the Commission's Rules by including in its petition a statement verifying the accuracy of the information contained therein. It has corrected this deficiency in comments responding to the *Further Notice*.

[6] According to Colon-Ventura, the population figures are based on the 1990 U.S. Census.

[7] WKJB cites *License Modification Pursuant to Section 316*, 2 FCC Rcd 3327 (1987), wherein the Commission stated that Section 316 "requires that we notify the affected station of the proposed action and the public interest reasons for that action and afford at least 30 days to protest."

mission ultimately adopt the proposals under consideration herein, it requests that each petitioner be made jointly and severally liable for the costs of WKJB's and Arso's channel changes. It believes that this action is warranted due to the number of parties involved and the need to protect the affected stations from undue delay in being reimbursed which could result from "ad hoc petitioner attempts at apportioning liability prior to payment."

8. Arso also opposes the adoption of the proposals under consideration herein. According to Arso, the expressed benefit of substituting Channel 258A for Channel 252A at Quebradillas, that is, the ability of Station WQQZ to operate with full Class A facilities of 6 kW, is illusory. In 1964 and 1968, Class A stations in Puerto Rico and the Virgin Islands, respectively, were permitted to operate with maximum antenna heights above average terrain of 335 meters (1100 feet) to compensate for the extreme terrain variations common to the area and the scarcity of FM broadcast stations. However, when the Commission amended its rules to permit Class A stations to operate with 6 kW of power, the Commission lowered the maximum height above average terrain for Puerto Rican stations to 240 meters (787 feet) so as to maintain a 42 kilometer distance to the 1 mV/m contour. Arso states that WQQZ presently operates at 3 kW with an antenna height of 305 meters (1000 feet) with a distance to its 1 mV/m contour of 40.05 kilometers. It submits that Station WQQZ need not change channel to improve its facilities to the maximum permitted. Rather, it can achieve maximum Class A coverage (42 kilometers) by increasing its power by only 600 watts, from 3 kW to 3.6 kW. If Station WQQZ does desire to operate with 6 kW, Arso states that it would have to reduce its antenna height to 240 meters (767 feet). Finally, Arso contends that sufficient public interest justifications have not been shown to justify the disruption which the forced channel changes would have on the long-established operations of Stations WPRM-FM and WKJB-FM. Arso recognizes that demand for an FM channel allotment to a community and an expressed intention to construct and operate the station is usually sufficient to justify a proposed allotment. However, it states that the Commission has recently recognized that many stations are experiencing financial difficulties and that the addition of new stations is not necessarily the better option. Therefore, it urges that all of the proposals under consideration herein be denied.

9. Colon-Ventura and V.I. Stereo jointly responded to the oppositions of WKJB and Arso. They disagree with WKJB that the Commission is required to issue a new *Order to Show Cause* to Arso and WKJB. They state that the Commission has already rejected their arguments and no new law or facts have been presented which would require a contrary result. They also take issue with the argument that Colon-Ventura is attempting a rural to urban migration by relocating Station WSAN from Vieques to Las Piedras. Colon-Ventura and V.I. Stereo point out that the Commission has found that Las Piedras is a community for allotment purposes, is not located within any Urbanized Area, and the community's location within a Metropolitan Statistical Area does not foreclose consideration. As to the merits of Colon-Ventura's proposal, they reiterate that its adoption would provide Las Piedras with a first local aural service while also enabling the station to achieve substantial service gains both in terms of area as well as population. Thus, they believe that the proposal advances the Commission's allocation policy.

10. They also take exception to Arso's arguments concerning the economic health of the radio industry. They contend that adoption of the Las Piedras and Vieques proposals would result in substantial service gains for close to two million people with no loss of existing Class B service at Vieques. They believe that this result would do nothing but enhance the economic health of the industry and thus serve the public interest. As to the issue of reimbursement, they again state that all of the parties which would be required to reimburse Arso and WKJB have committed to do so. They state that it is well settled Commission policy that what items are reimbursable is governed by *Circleville, Ohio*, 8 FCC 2d 159 (1967) and issues relating to reimbursement are left to the good faith negotiation of parties involved, with the Commission becoming involved only when such agreement is not possible. They agree that Arso and WKJB are entitled to reimbursement for those costs attributable directly to the change in frequency, but not for any improvements to or modernization of facilities. Further, they oppose the reimbursement for all costs incurred in responding to Colon-Ventura's Canovanas proposal, as requested by Arso because of his "failure to give timely notice of his change to Las Piedras." They state that the Commission has already ruled that Arso was given timely notice of the counterproposal and thus the basis for this particular claim for reimbursement is invalid.

DISCUSSION

11. As an initial matter, we find that the rights accorded WKJB and Arso pursuant to Section 316 of the Communications Act were not abridged because a new *Order to Show Cause* was not issued when comments were solicited on the merits of Colon-Ventura's counterproposal as well as the proposals filed by Amor, Hernandez and V.I. Stereo. WKJB agrees that the net effect on the station is the same regardless of which community receives the allotment. However, it argues that it is entitled to notice and an opportunity to comment on the public interest factors supporting the new proposal regardless of the fact that the new proposal does not alter the affected station's situation, that is, regardless of whether the original proposal or the counterproposal is ultimately adopted, the station will be required to change its operating frequency. We find that the Commission has complied with the dictates of Section 316 of the Communications Act by issuing an *Order to Show Cause* to WKJB and Arso when the *Notice* was issued proposing the original Colon-Ventura proposal and that no additional *Order to Show Cause* is required. Further, we find that WKJB and Arso were provided an opportunity to comment on the merits of the new proposals under consideration. In fact, the Commission served them with copies of the *Further Notice* upon its release. Although WKJB argues to the contrary, we believe that the public interest justification for proposing the modification of Station WKJB-FM's channel pursuant to the *Notice*, that is, the provision of new aural service through the allotment of an FM channel, has not changed with the issuance of the *Further Notice*. What has changed is the community proposed to receive the new allotment and Arso and WKJB, like all interested parties, are entitled to comment on the merits of the new proposal, including whether the proposal is sufficiently meritorious to warrant the disruption which they believe would be caused by the change in their station's operating channel. In fact, when the Commission proposes the allotment of a channel, it seeks comments not

only on the broad public interest benefit which would be achieved by the channel allotment but also on whether the proposal complies with the Commission's various technical rules and allotment policies. For instance, a proposed allotment could serve the public interest because it would result in the provision of a first local aural broadcast service. However, because the allotment requires a waiver of the Commission's minimum distance separation requirements, the Commission has found that the detriments accruing from the allotment of a substandard frequency outweigh the benefits which would flow from the provision of the local service. *See Chester and Wedgefield, South Carolina, Letter from Deputy Chief, Policy and Rules Division, to Stephen T. Yelverton (May 13, 1988), recon. den.*, 4 FCC Rcd 4503 (1989), *rev. den.*, 5 FCC Rcd 5572 (1990). In other instances, the Commission has denied allotments to places which were ultimately found not to qualify as a community for allotment purposes. *See Stock Island, Florida*, 8 FCC Rcd 343 (1993). In this case, the channel changes proposed for Stations WKJB-FM, Mayaquez, and WPRM-FM, San Juan, will permit the provision of first local aural services at Santa Isabel and Frederiksted. We find that this benefit alone outweighs the objections raised by Stations WKJB-FM and WPRM-FM. In addition, these channel changes allow Station WSAN-FM and Station WVIS to change their communities of license from Vieques to Las Piedras, and from Christiansted to Vieques, respectively, thus providing an additional two communities with first local aural services.

12. Arso's argument that the allotment proposals under consideration would cause Stations WPRM-FM and WKJB-FM to suffer economic harm raise issues which the Commission has already determined are not relevant in either a licensing or allotment context. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989), *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993) and *Albion, Nebraska*, 10 FCC Rcd 3183 (1995). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. There is also no requirement for a petitioner or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of the petitioner to apply for the requested channel and construct the proposed facilities.

13. Based on the record before us, we believe that the public interest would be served by the allotment of Channel 251A to Santa Isabel since it could provide the community with its first local aural transmission service. Santa Isabel is a community of 6,623 persons and Amor has submitted comments reiterating its intention to apply for the channel, if allotted.[8] Channel 251A can be allotted to Santa Isabel in compliance with the Commission's mileage separation requirements if Channel 256B is substituted for Channel 253B at San Juan and Channel 254B is substituted for Channel 256B at Mayaguez, We also find that the public interest would be served by the allotment of Channel 253A to Frederiksted, Virgin Islands, as that community's first local aural transmission service. Channel 253A can be allotted to Frederiksted in compliance with the Commission's mileage separation requirements if Channel 253B is deleted from San Juan and Channel 254B is substituted for Channel 256B at Mayaquez.

14. In examining the merits of a change of community of license proposal, we must determine whether the proposal would result in a preferential arrangement of allotments. *See Modification of FM and TV Authorizations to Specify a New Community of License* 4 FCC Rcd 4870 (1990) (*"Community of License R&O"*), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (*"Community of License MO&O"*). In determining whether a proposed reallotment represents a preferential arrangement of allotments, we apply the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).[9]

15. We find that the public interest would be served by the reallotment of Channel 291B from Christiansted, Virgin Islands, to Vieques, Puerto Rico, and the modification of Station WVIS's license to specify Vieques as its community of license. The allotment of Channel 291B to Vieques will provide the community, with a population of approximately 7,500 persons, with its first local FM broadcast transmission service if Station WSAN is relicensed to Las Piedras, thus fulfilling allotment priority (3). We note that Christiansted, with a population of 2,800 persons, will continue to receive local aural transmission service from five fulltime aural services. In addition, the reallotment of Channel 291B to Vieques will provide service to the entire loss area caused by the relocation of Station WSAN to Las Piedras. Channel 291B can be allotted to Vieques if the channel substitutions at San Juan and Mayaquez are adopted and if Channel 254A is substituted for Channel 293A at Culebra, Puerto Rico. At the time the *Further Notice* was issued, two applications were pending for the Culebra channel and each applicant was served with a copy of the *Further Notice*. On October 25, 1993, the Initial Decision of Administrative Law Judge Joseph P. Gonzalez was issued granting the application (BPH-911114MS) of Aurio A. Matos ("Matos") subject to the outcome of this proceeding. Having found that the public interest will be served by the allotment of Channel 291B to Vieques, we will order Matos to amend its outstanding application to specify Channel 254A. Matos is not entitled to reimbursement because the application was granted conditioned on the outcome of this proceeding. *See Bayou Vista and Franklin, Louisiana*, 34 RR 2d 1540 (1975) and *Marion, Mississippi*, 4 FCC Rcd 3720 (1989).

16. We also believe that the public interest would be served by substituting Channel 252A for Channel 255B at Vieques and reallotting Channel 252A to Las Piedras since it could enable Las Piedras to receive its first local aural transmission service and permit Station WSAN to provide service to an additional 561,535 persons. As proposed, we will also modify Station WSAN's license to specify Channel 252A at Las Piedras. Las Piedras is an independent community with its own local government which provides the residents with municipal services, its own businesses, health facilities, transportation systems, telephone book section and zip code. Further, Las Piedras is not located within any Urbanized Area. WKJB argues that the proposed relocation of Station WSAN should be considered the same as a move into an Urbanized Area because Las

[8] Population figures are taken from the 1990 U.S. Census, unless otherwise indicated.

[9] The FM allotment priorities are: (1) first aural service; (2) second aural service; (3) first local aural service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight.

Piedras is within the San Juan and Caguas Metropolitan Statistical Areas and much of the population gain is achieved by serving the residents within the San Juan and Caguas MSAs. In this regard, we point out that the Commission has declined to extend its concerns about the presumption of a first local service preference where a station seeks to move from a rural community to one within an Urbanized Area to those stations seeking to move from one rural community to another such community, even though it may be closer to an Urbanized Area. *See Pinetops and Scotland Neck, North Carolina*, 7 FCC Rcd 5113 (1992) and *Van Wert, Ohio and Monroeville, Indiana ("Van Wert")*, 7 FCC Rcd 6519 (1992) (will not presume that a community outside of, but near, an Urbanized Area is not entitled to a first local transmission service preference). Even so, the Commission has found in the past that the provision of a first local transmission service, by itself, may not be sufficient to justify the loss of a local aural transmission or reception service. *See Van Wert, supra*, and *Blackville, et al., SC*,, 7 FCC Rcd 6522 (1992). In this case, we find that neither WKJB nor Arso has provided any evidence that would lead us to believe that Las Piedras is not entitled to a first local transmission service preference. While Arso and WKJB contend that Station WSAN really seeks to serve the San Juan and Caguas Urbanized Areas rather than provide a first local aural service to Las Piedras, we find that the station will provide only the entire Caguas Urbanized Area with a 60 dBu signal.[10]

17. We recognize that the removal of Station WSAN from Vieques will create a reception service loss of 55,935 persons within an area of 192.4 square kilometers (74.2 square miles). However, the entire loss area will continue to receive at least five fulltime reception services, even if Station WVIS were not relicensed from Christiansted to Vieques, and thus is considered to be a well-served area. Further, with the reallotment of Channel 291B from Christiansted to Vieques, Station WVIS will provide service to the entire loss area since it proposes to use the transmitter site presently used by Station WSAN. Therefore, while we carefully consider any proposal that would result in a loss of existing reception service, we believe the public interest is well served by this reallotment proposal, given the provision of a first local aural transmission service to Las Piedras, the large reception service gains and the fact that the loss area will be negated by the service provided by Station WVIS.

18. Finally, we also grant the request of Arzuaga to substitute Channel 258A for Channel 252A at Quebradillas and modify the license of Station WQQZ accordingly. We have confirmed that Arzuaga can increase the power of Station WQQZ from its present 3 kW to 3.6 kW, on its present channel, and achieve a similar coverage increase as would occur if it changes channel and operates with 6 kW but at a reduced antenna height. However, we find that since Arzuaga believes there to be a benefit to its station by changing channel and the channel change enables new allotments at Las Piedras and Santa Isabel, the public interest would be served by granting the request. While the proposed channel change, standing alone, may not provide a sufficient basis upon which to require Stations WKJB-FM at Mayaguez and Station WPRM-FM at San Juan to change channel, taken in conjunction with the new allotments adopted herein, we believe there is sufficient public interest benefit to justify the channel substitution.

19. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies and all of the parties have stated their intention to reimburse the licensees of Stations WPRM-FM and WKJB for the reasonable costs associated with their change in channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Therefore, in accordance with Commission policy, Colon-Ventura, Arzuaga, V.I. Stereo and the ultimate permittees for the allotments at Santa Isabel and Frederiksted will be required to share in the reimbursement. We do not believe it necessary to make each of the petitioners severally liable for the costs associated with the change of channel by Stations WKJB and WPRM-FM as requested by WKJB. Our experience indicates that parties generally enter into good faith negotiations and resolve issues regarding reimbursement well' before a station actually changes channel. There is nothing in the record in this proceeding, and WKJB offers no evidence, to suggest that any of the parties responsible for participating in the reimbursement are not willing and able to do so. Further, the benefitting parties herein must coordinate their actions with the licensees of Stations WKJB-FM and WPRM-FM since it is Commission policy to condition construction permits which are dependent upon the change of channel by an existing station on the issuance of program test authority to that station. Therefore, the benefitting parties cannot go on the air with their new or improved services until such time as the existing licensees are ready to being operation on their new channels.

TECHNICAL SUMMARY

20. All of the channel allotments granted herein can be made in compliance with the Commission's minimum distance separation requirements. Channel 251A can be allotted to Santa Isabel with a site restriction of 3.6 kilometers (2.3 miles) east to avoid a short-spacing to Channel 254B at Mayaguez. Channel 291B can be allotted to Vieques without the imposition of a site restriction. Channel 254A can be allotted to Culebra without the imposition of a site restriction. Channel 252A can be allotted to Las Piedras with a site restriction of 14.6 kilometers (9.1 miles) northeast to avoid short-spacings to Station WBRQ, Channel 249A, Cidra, Puerto Rico, and to Channel 251A at Santa Isabel. Channel 258A can be allotted to Quebradillas at Station WQQZ's present transmitter site. Channel 254B can be allotted to Mayaguez at Station WKJB's present transmitter site. Channel 256B can be allotted to San Juan at Station WPRM-FM's present transmitter site. Channel 253A can be allotted to Frederiksted, Virgin Islands, without the imposition of a site restriction.[11] The allotments at

[10] WSAN will provide only a small percentage (15%) of the San Juan Urbanized Area and less than half (40%) of the Caguas Urbanized Area with 70 dBu service.

[11] The coordinates for Channel 251A at Santa Isabel are 17-58-12; 66-22-09. The coordinates for Channel 291B at Vieques are 18-19-39; 65-18-05. The coordinates for Channel 254A at Culebra are 18-18-18; 65-18-06. The coordinates for Channel 252A at Las Piedras are 18-16-14; 65-45-33. The coordinates for Channel 258A at Quebradillas are 18-23-33; 66-59-46. The coordinates for Channel 254B at Mayaguez are 18-09-05; 66-59-19.

Santa Isabel, Mayaguez and San Juan are located in the vicinity of the Commission's Santa Isabel monitoring station. Therefore, the affected parties will be required to comply with the provisions of Section 73.1030(c) of the Commission's Rules.

21. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 7, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Culebra, Puerto Rico	254A
Las Piedras, Puerto Rico	252A
Mayaguez, Puerto Rico	231B, 248B, 254B
Quebradillas, Puerto Rico	258A
San Juan, Puerto Rico	229B, 256B, 260B, 273B, 284B, 289B
Santa Isabel, Puerto Rico	251A
Vieques, Puerto Rico	291B
Christiansted, Virgin Islands	228B, 236B, 258B, 262B
Frederiksted, Virgin Islands	253A, 278A

22. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Carlos J. Colon-Ventura for Station WSAN, IS MODIFIED to specify Las Piedras, Puerto Rico, in lieu of Vieques, Puerto Rico, as its community of license, and specify operation on Channel 252A, in lieu of Channel 255B, the license of V.I. Stereo Communications Corp. for Station WVIS, Channel 291B, IS MODIFIED to specify Vieques, Puerto Rico, in lieu of Christiansted, Virgin Islands, as its community of license, the subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

23. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Jose J. Arzuaga for Station WQQZ, IS MODIFIED to specify operation on Channel 258A in lieu of Channel 252A at Quebradillas, Puerto Rico, the license of WKJB-AM-FM, Inc., for Station WKJB-FM, IS MODIFIED to specify operation on Channel 254B in lieu of Channel 256B at Mayaguez, Puerto Rico, the license of Arso Radio Corporation for Station WPRM-FM, IS MODIFIED to specify operation on Channel 256B in lieu of Channel 253B at San Juan, Puerto Rico, and the construction permit of Aurio A. Matos (BPH-911114MS) for a new FM station at Culebra, Puerto Rico, IS MODIFIED to specifyh) operation on Channel 254A in lieu of Channel 293A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WQQZ's license, BLH-881019KA, Station WPRM-FM's license, BLH-5837, or Matos' construction permit (BPH-911114MS) except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-881019KA, BLH-5837 and BPH-911114MS, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

24. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following permittee and licensees, as follows: Arso Radio Corp., P.O. Box 487, Caguas, Puerto Rico 00625, Radio Station WKJB AM-FM, Inc., P.O. Box 1293, Mayaguez, Puerto Rico 00708, and Aurio Matos, P.O. Box 847, Mayaguez, Puerto Rico 00681.

25. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Carlos J. Colon-Ventura and V.I. Stereo Communications Corp., licensees of Stations WSAN and WVIS, respectively, are required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

26. The window period for filing applications for Channel 251A at Santa Isabel, Puerto Rico, and Channel 253A at Frederiksted, Virgin Islands, will open on **August 7, 1995**, and close on **September 7, 1995**.

27. IT IS FURTHER ORDERED, That the portion of Carlos J. Colon-Ventura's request to reallot Channel 252A from Vieques, Puerto Rico, to Canovanas, Puerto Rico (RM-7309) IS DISMISSED.

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

The coordinates for Channel 256B at San Juan are 18-06-45; 66-03-07. The coordinates for Channel 253A at Frederiksted are 17-42-48; 64-53-00.

29. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Mass Media Bureau
Policy and Rules Division

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 95-24

In the Matter of

Amendment of Section 73.202(b), RM-8583
Table of Allotments,
FM Broadcast Stations.
(Clarendon, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 13, 1995; Released: June 22, 1995

By the Chief, Allocations Branch:

1. At the request of ROHO Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 2101, (1995), proposing the allotment of Channel 257C2 to Clarendon, Texas, as the community's first local aural transmission service. Petitioner filed comments reiterating its intention to apply for Channel 257C2, if allotted to Clarendon.[1] No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 257C2 to Clarendon, since it would provide the community with its first local service. Channel 257C2 can be allotted to Clarendon in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 7, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clarendon, Texas	257C2

4. The window period for filing applications will open on **August 7, 1995**, and close on **September 7, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

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[1] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly by filing an affidavit.

[2] The coordinates for Channel 257C2 at Clarendon are North Latitude 34-56-16 and West Longitude 100-53-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 95-70

In the Matter of

Amendment of Parts 22, 90, and 94 of the Commission's Rules to Permit Routine Use of Signal Boosters — RM-8200

NOTICE OF PROPOSED RULE MAKING

Adopted: May 17, 1995; Released: June 22, 1995

Comment Date: July 14, 1995
Reply Comment Date: August 1, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has received a Petition for Rule Making (Petition) from TX RX Systems, Inc. (TX RX) requesting that Parts 22, 90, and 94 of the Rules and Regulations be amended to permit routine use of one-way or two-way signal boosters.[1] Comments supporting the petition were received from five parties.[2] This *Notice of Proposed Rule Making* (*Notice*) proposes to permit licensees to routinely use signal boosters in Part 22 common carrier paging operations, Part 90 land mobile radio and paging operations, and Part 94 multiple address system operations.

II. BACKGROUND

2. A signal booster is a device that receives an incoming signal, amplifies it, and retransmits it on the same frequency. It is used to improve communications in locations within the normal coverage area of a radio system where the signal is blocked or shielded due to natural terrain or man-made obstacles (*e.g.* to provide fill-in coverage but not increase the normal coverage area). For instance, signal boosters may be used to fill in "dead spots" in locations such as valleys, tunnels, below-ground parking facilities, or inside cargo vessels and aircraft hangers. Signal boosters may be designed for either one-way or two-way operation.[3]

3. There are two general types of signal boosters, narrowband boosters and broadband boosters. A narrowband booster is designed to amplify only those discrete frequencies intended to be transmitted.[4] A broadband booster amplifies all frequencies that are received within the booster's passband.[5] The passband of a signal booster may range from 50 kilohertz to 20 megahertz, but is typically between 2 and 10 megahertz.

4. Currently, under Part 90 Private Land Mobile Radio Services rules, signal boosters may be used only on ten Business Radio Service frequency pairs in the 450-470 MHz band for communications related to the servicing and supplying of aircraft at certain specified airports.[6] Under Part 22 Public Mobile Service rules, a form of signal booster, generally called a cellular repeater, may be employed by cellular licensees without separate licensing provided that the repeater does not extend the licensee's signal beyond the authorized cellular service area.[7]

III. DISCUSSION

5. Signal boosters have proven to be a viable and practical way to resolve signal coverage problems caused by natural or man-made obstacles thereby allowing licensees to make maximum use of radio systems. Further, the comments unanimously supported expanding the use of signal boosters. Therefore, we propose to expand the use of signal boosters to Part 22 common carrier paging operations at 931-932 MHz, to Part 90 land mobile radio operations in all Part 90 frequency bands above 150 MHz, to Part 90 paging operations at 929-930 MHz, and to Part 94 multiple address system operations in the 928-960 MHz band.

6. We propose to define a signal booster as a device that automatically receives, amplifies, and retransmits on a one-way or two-way basis, the signals received from base stations, mobile, and portable units, with no change in frequency or authorized bandwidth. We propose to classify boosters as either narrowband (Class A), in which case the booster amplifies only those discrete frequencies intended to be retransmitted, or broadband (Class B), where all signals within the passband of the signal booster filter are amplified. We further propose that licensees may employ either Class A or Class B signal boosters as required, be responsible for eliminating any harmful interference that the signal booster may cause to other licensees, and for ensuring that the basic authorized coverage area is not expanded.[8]

7. In its comments on the Petition, ATG suggests that boosters be required to employ a directional antenna to decrease the possibility of undesired co-channel base station transmissions being received and retransmitted, and to reduce the risk of interference by the booster to other co-

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[1] Petition for Rule Making, RM-8200, filed on February 25, 1993.

[2] Comments were received from Allen Telecomm Group (ATG), Celwave (Celwave), The Jack Daniel Company (Daniel), Motorola, Inc. (Motorola), and the Utilities Telecommunications Council (UTC). Reply comments were filed by TX RX.

[3] Two-way signal boosters operate in the full duplex mode with different frequencies transmitted in each direction.

[4] In a narrowband booster, although the output frequencies are the same as the input frequencies, the incoming frequencies intended to be retransmitted undergo a frequency conversion within the booster. This frequency conversion technique enables the booster to amplify only desired frequencies.

[5] Broadband boosters are suited for use in tunnels and other confined areas where the possibility of adjacent frequency signals being received by the booster is unlikely.

[6] *See* 47 C.F.R. § 90.75(c)(25). We have also granted waivers to allow other Part 90 licensees to use signal boosters.

[7] *See* 47 C.F.R. §22.165.

[8] Reception of co-channel transmissions on shared frequencies in the same geographic area will not be considered as interference.

channel or adjacent channel base stations.[9] We are not convinced that the use of directional antennas should be mandated. We believe there are many systems in which an omnidirectional booster antenna would be preferable. As previously mentioned, we propose to make licensees responsible for correcting any interference caused by the use of boosters and one method may be to use a directional antenna in a specific application, but this does not mean that all systems should be required to use directional antennas. We tentatively conclude that antenna selection should be left to the licensee, and request comment on this conclusion.

8. We propose to limit the total output power of a booster to 500 milliwatts (mw). The output power of broadband (Class B) boosters would be determined by dividing the total available booster power by the number of authorized frequencies (channels) that the booster is retransmitting. Considering that there would most likely be some gain in a typical booster antenna, the proposed 500 mw transmitter power level will approximate the transmitted effective radiated power of most hand-held portable units. We believe that this booster power level should be adequate for the intended purpose while still being sufficiently restrictive to guard against interference to other users.[10] To limit potential interference from any spurious emissions generated by the booster, we propose that all signal boosters must meet the out-of-band emission requirements currently specified in the rules.[11]

9. In the Petition and comments, suggestions were made concerning the use of signal boosters that translate the incoming frequency to a different outgoing frequency. The petitioner states that it recognizes that there are unique situations, such as systems requiring coverage below ground, where a booster/translator would be required to translate an incoming signal to a different frequency.[12] ATG suggests that this proceeding be expanded to incorporate the use of booster/translators.[13] Motorola recommends that a licensee be permitted to use a booster/translator if it has exclusive use in its area of operation of the input and output frequencies utilized in the booster.[14]

10. By definition, a signal booster is a device that retransmits a signal with no change in frequency or authorized bandwidth.[15] A booster is intended to fill in weak or no-signal areas that may be present in a licensee's area of operation. A booster/translator, however, requires different input and output frequencies and is functionally the same as a mobile relay or repeater station, although operating at a lower power level. The comments concerning the use of booster/translators indicate that such devices could be used to extend a licensee's coverage area. We are concerned that booster/translators could be used to extend the coverage area and thereby increase the potential for interference. We decline to propose authorizing the use of booster/translators to extend service area coverage, but request comment on authorizing their use to provide better coverage within a licensee's existing service area. In particular, we request comment on the types of situations in which a booster/translator would be superior to a booster for this purpose.

11. The petitioner requests that licensees seeking to employ signal boosters to penetrate structures or other obstacles within the area customarily served by the licensee's system not be required to obtain specific authorization to utilize the signal boosters, provided that the signal boosters have been type accepted by the Commission. The petitioner suggests that the authority for licensees to use signal boosters be similar to the provisions governing operation of speed radar units in the Part 90 Public Safety Radio Services.[16] Motorola comments that the use of boosters should be reflected on the station authorization either by the addition of a letter to the station class as is now done with Part 90 interconnected systems, or by a provision on the license stating that the system uses boosters in accordance with the applicable rule section. This would allow identification of the licensee in the unlikely event an interference problem arises.[17] UTC suggests that a licensee obtain blanket authority to operate signal boosters generally and provide the Commission and the applicable frequency coordinator specific information on Class A booster deployment.[18]

12. The installation and operation of a signal booster would be on frequencies already authorized to a licensee in a specific geographic area. Further, because the booster will not extend a station's coverage area, there should be little chance for interference to distant co-channel users. Thus, there appears to be little justification for creating additional burdens for the licensee or the Commission by requiring a licensee to obtain separate authorization for the operation of a signal booster. Therefore, we are proposing to allow eligible Part 22, 90, and 94 licensees to operate signal boosters without separate authorization from the Commission. Licensees will be required to use type accepted equipment and to ensure that all applicable rule requirements are met.

IV. PROCEDURAL MATTERS

Regulatory Flexibility Act.

13. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary

[9] Comments of ATG at 3.
[10] The power output is the same as for boosters currently authorized in the 450 MHz band. *See* 47 C.F.R. § 90.75(c)(25)(ii).
[11] *See* 47 C.F.R. §§ 22.106, 90.209, and 94.71.
[12] TX RX suggests that such booster/translators be licensed as repeaters. Petition at n.17.
[13] ATG states that booster/translators would satisfy the needs of SMRs and other licensees in rural areas to extend coverage areas at minimal cost. Comments of ATG at 3.
[14] Comments of Motorola at 3.
[15] *See* 47 C.F.R. § 90.7.
[16] Rule sections 47 C.F.R. §§ 90.17(e)(4), 90.19(g)(6), 90.21(e)(4), 90.23(e)(3), and 90.25(e)(3) permit licensees to operate type accepted speed radar units under their base/mobile station license. A specific authorization from the Commission is not required.
[17] Comments of Motorola at 3.
[18] Comments of UTC at 6.

shall send a copy of this *Notice*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

Ex Parte Rules - Non-Restricted Proceeding.

14. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates.

15. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47. C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **July 14, 1995,** and reply comments on or before **August 1, 1995**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the F.C.C. Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Authority.

16. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

17. For further information concerning this proceeding, contact Eugene Thomson, Wireless Telecommunications Bureau, (202) 418-0634.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Parts 22, 90, and 94 of Chapter I of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

PART 22 - PUBLIC MOBILE SERVICE

1. The authority citation for Part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.99 is amended by adding the definition for "signal booster" in alphabetical order to read as follows:

§ 22.99 Definitions.

* * * * *

Signal booster. A stationary device that automatically reradiates signals from base transmitters without channel translation, for the purpose of providing service in weak signal areas.

* * * * *

3. Section 22.377 is amended by revising the first sentence of the introductory text to read as follows:

§ 22.377 Type-acceptance of transmitters.

Except as provided in paragraph (b) of this section, transmitters used in the Public Mobile Services, including those used with signal boosters, in-building radiation systems and cellular repeaters must be type-accepted for use in the radio services regulated under this part. * * *

* * * * *

4. A new Section 22.385 is added to read as follows:

§ 22.385 Signal boosters.

Licensees may install and operate signal boosters without applying for authorization or notifying the Commission, subject to the requirements of this section.

(a) The location of each signal booster must be within the protected service area of the licensee's authorized base transmitter(s) on the channel being reradiated.

(b) Any signal booster used must be designed such that the transmitter output power cannot exceed 500 milliwatts under any normal operating condition.

(c) Licensees must not allow any signal booster that they install and operate to cause interference to the service or operation of any other authorized stations and systems.

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, and 332, 48 Stat. 1066, 1082, as amended: 47 U.S.C.154, 303, and 332, unless otherwise noted.

2. Section 90.7 is amended by revising the definition for "signal booster" to read as follows:

§ 90.7 Definitions.

* * * * *

Signal booster. A device which automatically receives, amplifies, and retransmits on a one-way or two-way basis, the signals received from base, fixed, mobile, and portable stations, with no change in frequency or authorized bandwidth. A signal booster may be either narrowband (Class A), in which case the booster amplifies only those discrete frequencies intended to be retransmitted, or broadband (Class B), in which case all signals within the passband of the signal booster filter are amplified.

* * * * *

3. Section 90.75(c)(25) is amended by revising the introductory paragraph and paragraphs (i) through (iii), removing paragraphs (iv), (v), (vi), and (vii), and redesignating paragraph (viii) as (iv), to read as follows:

§ 90.75 Business Radio Service.

* * * * *

(c) ***

(25) This frequency is available for assignment as follows:

(i) To persons furnishing commercial air transportation service or, pursuant to § 90.179, to an entity furnishing radio communications service to persons so engaged, for stations located on or near the airports listed in paragraph (c)(25)(iv) of this section. Stations will be authorized on a primary basis and may be used only in connection with the servicing and supplying of aircraft.

(ii) To stations in the Business Radio Service for secondary use at locations 80 km (50 mi) or more from the coordinates of the listed airports at a maximum ERP of 300 watts.

(iii) To stations in the Business Radio Service for secondary use at locations 16 km (10 mi) or more from the coordinates of the listed airports at a maximum transmitter output power of 2 watts. Use of the frequency is restricted to the confines of an industrial complex or manufacturing yard area. Stations licensed prior to April 17, 1986 may continue to operate with facilities authorized as of that date.

* * * * *

4. A new Section 90.219 is added to read as follows:

§ 90.219 Use of signal boosters.

Licensees authorized to operate radio systems in the frequency bands above 150 MHz may employ signal boosters in accordance with the following criteria:

(a) The amplified signal is retransmitted only on the exact frequency(ies) of the originating base, fixed, mobile, or portable station(s). The booster will fill in only weak signal areas and cannot extend the system's signal coverage area.

(b) The booster must be equipped with automatic gain control circuitry which will limit the total output power of the unit to a maximum of 500 milliwatts under all conditions. Per channel output power on broadband (Class B) units is the total output power (500 mw) divided by the number of channels amplified. All equipment must meet the out-of-band emission limits of § 90.209.

(c) Boosters must be installed with sufficient isolation between receiving and retransmitting circuits to prevent oscillation.

(d) The licensee is given authority to operate signal boosters without separate authorization from the Commission. Type-accepted equipment must be employed and the licensee must ensure that all applicable rule requirements are met.

(e) Licensees employing Class B signal boosters as defined in § 90.7 are responsible for correcting any harmful interference that the equipment may cause to other systems.

PART 94 - PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation for Part 94 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 94.3 is amended by adding the definition for "signal booster" in alphabetical order to read as follows:

§ 94.3 Definitions.

* * * * *

Signal booster. A device which automatically receives, amplifies, and retransmits on a one-way or two-way basis, the signals received from base, fixed, mobile, and portable stations, with no change in frequency or authorized bandwidth. A signal booster may be either narrowband (Class A), in which case the booster amplifies only those discrete frequencies intended to be retransmitted, or broadband (Class B), in which case all signals within the passband of the signal booster filter are amplified.

* * * * *

3. Section 94.95 is added to read as follows:

§ 94.95 Use of signal boosters.

Licensees authorized to operate multiple address systems in the 928-929/952-960 MHz and 932-932.5/941-941.5 MHz bands may employ signal boosters in accordance with the following criteria:

(a) The amplified signal is retransmitted only on the exact frequency of the originating master or remote station. The booster will fill in only weak signal areas and cannot extend the system's signal coverage area.

(b) The booster must be equipped with automatic gain control circuitry which will limit the total output of the booster to 500 milliwatts under all conditions. Boosters must meet the out-of-band emission limits of § 94.71.

(c) Boosters will be installed with sufficient isolation between receiving and retransmitting circuits to prevent oscillation.

(d) The licensee is given authority to use signal boosters without separate authorization from the Commission. Type-accepted equipment must be employed and the licensee must ensure that all applicable rule requirements are met.

(e) Licensees employing Class B signal boosters as defined in § 94.3 are responsible for correcting any harmful interference that the signal booster may cause to other systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 9, 1995

Released: June 22, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Boston Celtics Broadcasting Limited Partnership
Licensee, WFXT(TV)
1000 Providence Highway
Dedham, MA 02026

1800E

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On November 26, 1993, you filed an application for renewal of license (FCC Form 303-S) for Station WFXT(TV), Boston, MA (File No. BRCT-931126KE). In a supplement to FCC Form 303-S you indicate that during the previous license term WFXT(TV) had not complied with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commissions Rules. In Exhibit 2 to your application you state that, on six occasions between September 28, 1993, and October 13, 1993, WFXT(TV) aired commercials relating to program content during the program "Power Rangers". You assert that these overages were inadvertent instances of human error, and that WFXT(TV) took steps to ensure against recurrence of similar errors in the future.

On May 9, 1994, you filed an amendment to your renewal application in which you cite two additional occasions on which WFXT(TV) exceeded the limitations on commercial matter in children's programming. Specifically, you state that, during the airing of the program "Tazmania" on March 19, 1994, the Fox Network had placed a 10-second "premium" spot featuring a character from that program. You assert that the network's compliance review procedures then in place did not detect the character's appearance until after the spot aired, but that the network has now instituted new review procedures to avoid recurrence of this problem. Finally, you stated that errors in WFXT(TV)'s Master Control caused a 30-second overage on April 1, 1994, and that the station has instituted procedures to avoid recurrence.

During the license term in question, after the children's programming commercial limitations became effective, WFXT(TV) exceeded those limitations on eight occasions, seven of which were program-length commercials. This record constitutes a repeated violation of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Boston Celtics Broadcasting Limited Partnership is hereby advised of its apparent liability for forfeiture in the amount of ten thousand dollars ($10,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993)."[1]

[1] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) (*"Policy Statement/Assessing Forfeitures"*), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communica-

The eight occasions on which WFXT(TV) exceeded the hourly limits on commercial matter during children's programming is a significant number of violations. Moreover, seven occurrences were program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18. The fact that WFXT(TV) now may have implemented a plan to prevent future violations of the Commission's children's television rules and policies does not relieve the station of liability for prior violations. *International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $10,000.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregardfor Commission requirements. Accordingly, we do not believe that these violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WFXT(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Boston Celtics Broadcasting Limited Partnership, File No. BRCT-931126KE, for Station WFXT(TV), Boston, MA, IS HEREBY GRANTED for a term to end on April 1, 1999.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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tions Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (adopted March 10, 1995, released April 5, 1995, FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (adopted March 10, 1995, released April 5, 1995, FCC 95-109)"

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Duchossois Communications Co. of Maryland, Inc. (assignor) — File No. BALH-930528GI

and

Liberty Broadcasting of Maryland, Inc. (assignee)

For Assignment of License and Sale of the Assets of Station WHFS(FM), Annapolis, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1995; Released: June 22, 1995

By the Commission:

1. The Commission has before it an application for review, filed by Patricia Ebbert ("Ebbert") on January 21, 1994, seeking re-examination of a December 21, 1993 action by the Chief, Audio Services Division, Mass Media Bureau ("Bureau") granting the above-referenced application and denying Ebbert's petition to deny. Duchossois Communications Co. of Maryland, Inc. ("DCC") and Liberty Broadcasting of Maryland, Inc. ("Liberty") each filed an opposition to the application for review on February 7, 1994, and Ebbert filed a reply to each opposition on February 22, 1994.[1] For the reasons stated below, we deny the application for review and refer the violations admitted and established to the Bureau's Enforcement Division for appropriate proceedings.

BACKGROUND

2. DCC and Liberty filed the instant assignment application on May 28, 1993. On July 14, 1993, Ebbert filed a timely petition to deny that proposal, alleging numerous violations of the Commission's technical and operational requirements. Several rounds of pleadings followed.[2] After reviewing the pleadings, the Chief, Audio Services Division, granted the application and denied Ebbert's petition to deny. *Letter to Patricia Ebbert et al.*, reference 1800B3-MFW (Chief, Audio Services Division, Mass Media Bureau, December 21, 1993) ("Letter Ruling"). In so doing, the Bureau found that DCC had admitted or that Ebbert had established the following violations:

> 1) Violation of 47 C.F.R. §§73.1230 and 73.1860, which require that licensed operators be in charge of a station's transmitter board and that operator licenses be posted.[3]
>
> 2) Violation of 47 U.S.C. §301, concerning station authorizations, because DCC operated from its previously licensed Annapolis transmitter site[4] without authority and operated an unauthorized studio-transmitter link from the station's Landover studio;
>
> 3) Violation of 47 C.F.R. §73.1201, the station identification rule;[5]
>
> 4) Violation of 47 C.F.R. §73.1207, the rebroadcasting rule;[6]
>
> 5) Violation of 47 C.F.R. §73.1206, the rule regarding broadcast of telephone conversations;[7]
>
> 6) Violation of 47 C.F.R. §73.1212, the sponsorship identification rule;[8] and

---

[1] DCC subsequently filed a "Motion to Strike" Ebbert's Reply, which Ebbert opposed on March 23, 1994. For the reasons stated *infra*, DCC's motion to strike will be granted to the extent that material submitted with the Reply was not presented to the Bureau and otherwise denied.

[2] These included: (i) oppositions to the petition to deny filed by DCC and Liberty on August 2, 1993; (ii) Ebbert's reply, filed on August 11, 1993; (iii) DCC's "Motion to Strike" new material allegedly raised in the reply, filed on August 26, 1993; (iv) Ebbert's opposition to that motion, filed on September 9, 1993; (v) DCC's "Conditional Response to New Matter," filed on September 14, 1993 and accompanied by an appropriate "Motion for Leave to File Additional Pleading;" and (vi) Ebbert's opposition to the "Conditional Response," accompanied by an "Opposition to Motion for Leave to File Additional Pleading," both filed on September 29, 1993.

[3] These violations were mitigated by their short duration, age, and correction.

[4] The station is licensed to operate from a transmitter site in Crofton, Maryland. *See* BLH-891006KA, granted on November 27, 1989. The station admitted to some 39 specific instances of unauthorized operation from the Annapolis site.

[5] DCC admitted that it broadcast a recorded "WHFS, Annapolis" announcement ten minutes before the hour and a "WHFS, Washington-Baltimore" spot at the top of the hour. Letter Ruling, at 9. The rule requires identification of a station's call letters, immediately followed by its community of license, each hour at a natural break in program offerings.

[6] DCC admitted that it rebroadcast selected transmissions originated by other stations in 12 of the 60 instances submitted in Ebbert's petition to deny. Staff Ruling, at 9-10.

[7] DCC admitted that, in four of the seven instances submitted by Ebbert, it broadcast telephone conversations without obtaining the prior consent of the involved party. Letter Ruling, at 10.

[8] The violation was found with respect to two programs "'99 Reality Check" and "Alternative Look," which Ebbert demonstrated were in fact "sponsored" under Section 73.1212. The Bureau held that Ebbert had not established a violation of the sponsorship identification rule with respect to other cited station promotions because she had not

> demonstrated that the station failed to denote the sponsor of its trip promotions and she does not dispute that the station may make use of its promotional record collection without identifying the donor unless it is established that extra copies were provided as an inducement to play the record.... Ebbert herself states that promotional announcements were given and DCC emphasizes that the record company providing the records and merchandise was identified in those promotional announcements.

Letter Ruling, at 14.

7) Violation of 47 C.F.R. §73.1216, the rule governing licensee-conducted contests.[9]

The Bureau also found that Ebbert had not established a violation of the public file rule, 47 C.F.R. §73.3526. Additionally, the Bureau refused to rule on Ebbert's charges that the station had violated the "lowest unit charge" provisions for political(candidates contained in 47 C.F.R. §73.194 because those allegations were the subject of a collateral complaint proceeding.

3. Based upon these findings, the Bureau stated:

> We believe that, while these violations are indeed serious, they do not, taken individually or as a whole, rise to the level that would require a hearing. Rather, they are best handled as part of a separate enforcement proceeding. *See, e.g., Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95 (D.C. Cir. 1985); *see also Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 398 (D.C. Cir. 1985), *citing Southwestern Operating Co. v. FCC*, 351 F.2d 834, 835 (D.C. Cir. 1965). We cannot find that DCC's stewardship of WHFS "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable or unwilling to correct the operating deficiencies," *see Lewel Broadcasting Co.* [86 FCC 2d 896 (1981)] and *Fred Kaysbier* [34 FCC 2d 788 (1970)], *supra,* because DCC has taken steps to correct each of the admitted violations (albeit after the petition called attention to them). Finally, we cannot say, based on the record produced here, that the "number, nature, and extent" of the violations indicates that DCC "cannot be relied upon to operate ... in accordance with the requirements of its licenses and the Commission's Rules." *Compare Heart of the Black Hills Stations* [32 FCC 2d 196 (1971)], *Center for Study and Application of Black Economic Development* [6 FCC Rcd 4622 (1991)], and *Calvary Educational Broadcasting Network, Inc.* [7 FCC Rcd 4037 (1992)], *supra,* where the numerous violations occurred continuously for years and contrary to express Commission commands that they be resolved. Letter Ruling, at 16. It then denied Ebbert's petition and granted the assignment application. *Id.* at 17.[10]

PLEADINGS

4. *Ebbert's Application for Review.* In her application for review, Ebbert essentially makes four charges. First, she states that the Bureau erred when it refused to consider the allegations raised in her petition to deny regarding DCC's alleged violation of the lowest unit charge provisions of Section 73.1940 and when it neglected to consider her allegation that DCC had unlawfully "directionalized" WHFS' signal. Second, Ebbert claims that the Bureau erred when it found no rule violation of the sponsorship identification rule with respect to promotional compact discs and other merchandise and four promotional trips to see musical acts in Florida, Philadelphia, and New York.[11] The Bureau found no violation because "Ebbert herself states that promotional announcements were given and DCC emphasizes that the record company providing the records and merchandise was identified in those promotional announcements." Letter Ruling, at 14. However, Ebbert argues that she "specifically declared ... that the sponsors were not identified in these promotional announcements," Application for Review, at 9, and she includes with her application for review transcripts of the promotional announcements in question. Third, Ebbert states that the Bureau erred when, with respect to her allegation that DCC violated the Commission's rules on conducting contests, it held that she did not identify the prizes which were not awarded. She argues on appeal that she did in fact identify such prizes.[12] Finally, Ebbert states that, when all of the rule violations are considered, she has clearly made a *prima facie* case both that the rule violations were sufficiently willful and repeated to require designation for evidentiary hearing and that DCC was "incapable of or unwilling to correct" its myriad rule violations. Application for Review, at 11-14.[13] Furthermore, states Ebbert, the proposed assignee has stated that it intends to retain the same management team responsible for the rule violations under DCC's stewardship. This, states Ebbert, is "manifestly not in the public interest." *Id.* at 15.

5. *Liberty's Opposition.* In its opposition to the application for review, Liberty states that: (i) the Letter Ruling fully addressed Ebbert's allegations; (ii) the Bureau's determination that a hearing was not required was proper, given the violations involved; (iii) Liberty is qualified to acquire WHFS; and (iv) Ebbert's claim that Liberty will retain WHFS' current management is hearsay and should be disregarded. In any event, Liberty contends, "whether or

[9] The Bureau found that Ebbert had established violations of the contest rules with respect to two contests. *See* note 25, *infra*. However, it held that Ebbert had not established violations of the contest rule with respect to WHFS' "$30,000 in Cash and Prizes," "June Music Month," and "Halloween" promotional contests, because she failed to identify with specificity the prizes which allegedly were not awarded.

[10] DCC and Liberty consummated the WHFS assignment on March 1, 1994. Prior to consummation, however, Liberty sought and received approval of a "short-form" assignment of the station to a subsidiary, WHFS, Inc. *See* application no. BALH-940111GO, granted January 24, 1994.

[11] The trips involved were: (i) to New York to see a production of "Saturday Night Live" and a Billy Bragg concert; (ii) to Philadelphia to see the band U-2; (iii) to Florida, also to see U-2; and (iv) to New York to see singer Sara McLachlan on the "David Letterman Show."

[12] With respect to a "$30,000 In Cash and Prizes" promotion, Ebbert notes that the prizes not awarded were identified as "cash, trips, compact disc players, and concert tickets." With respect to a "Halloween" promotion, Ebbert argues again, as below, that the advertised trips to Jamaica were awarded only after repeated complaints from winners and advertisers. Ebbert also for the first time provides details to support her allegation, previously rejected by the Bureau, as to how a WHFS "Birthday Bash" promotion was conducted "without adequate supervision." Specifically, she contends that college interns who had never run a contest were sent to conduct this one, and minors were improperly given tickets to nightclubs serving alcoholic beverages.

[13] Ebbert states that DCC's violations were more "repeated and broader in scope" than those in *Lewel, supra,* one of the cases the Bureau heavily relied on in deciding not to designate DCC for hearing. *See* Paragraph 3, *supra*. She also argues that DCC's violations were willful to the extent that, in many instances, DCC knew that it was performing the violative act, even if it did not know that it was violating any Commission rule.

not Liberty will retain existing managers does not support Ebbert's charge that Liberty is unqualified and certainly does not require designation for hearing." Liberty Opposition, at 8.

6. *DCC's Opposition*. DCC maintains that the Bureau properly determined that DCC's technical violations do not warrant an evidentiary hearing. With respect to Ebbert's charge that the sponsors of specified station promotions were not identified, DCC states that Ebbert's declaration submitted with the application for review contains new, unauthorized evidence in the form of transcripts which allegedly document the failure to identify the sponsors of the promotions.[14] DCC states that, as it previously indicated, it believed the sponsors were identified to the extent required by the Commission's rules. DCC also includes copies of several "on-air scripts" for the promotions in question which clearly indicate that the record company co-sponsoring the promotion was identified on-air. Based on these scripts, DCC states that it "seriously doubts" the reliability of Ebbert's transcripts. DCC Opposition, at 9.

7. DCC states that the Bureau satisfactorily resolved all other outstanding issues concerning WHFS' conduct. Specifically regarding the directional antenna charge, it states that, while the staff's Letter Ruling did not discuss in detail Ebbert's claim, it was one of "several issues" referenced by the Bureau which required "little discussion." DCC also states that the Bureau acted well within its discretion in electing to consider Ebbert's political complaint in a pre-existing collateral proceeding rather than to consolidate it into the assignment application. Finally, DCC maintains that an evidentiary hearing on the WHFS assignment application would not further the public interest, emphasizing that "the Commission's primary focus must not be solely on the seller's qualifications, but rather on the conduct of the licensee that will be operating the station in the future and ensuring that the public receives quality broadcast service."[15]

8. *Ebbert's replies*. Ebbert replied to both Liberty's and DCC's opposition. In her reply to DCC's opposition, Ebbert argues that DCC has not been forthright and candid with the Commission throughout this proceeding. She claims that its opposition provides two additional examples of dishonesty. First, she notes DCC's claim that the sponsors of the promotional announcements in question were identified and their production of "on-air scripts" to attack the reliability of her transcripts. Ebbert argues that DCC was disingenuous, and submits copies of audiotapes purportedly containing the actual promotional announcements which she transcribed. She states that these tapes conclusively demonstrate the falsity of DCC's claim that the sponsors of the subject promotional announcements were identified and raise substantial and material questions of fact regarding whether or not DCC misrepresented facts or lacked candor by submitting scripts that did not accurately reflect what was broadcast. Second, Ebbert claims that DCC's assertion that "many employees who may have knowledge of these matters have since left the station" is misleading, arguing that principal employees with knowledge of these matters are still employed at WHFS. Finally, Ebbert restates her position that the number and extent of DCC's willful violations demonstrate that DCC cannot be trusted to comply with the Commission's rules.

9. DCC moved to strike Ebbert's reply on March 9, 1994, stating that the submission of the audiotapes constituted another belated attempt to introduce new factual evidence which was available at earlier stages into the proceeding in violation of 47 C.F.R. §1.115(c). DCC admits that, if Ebbert's tape is accurate, "some WHFS announcers may have deviated from prepared scripts when they announced certain promotions," but states that it "disclosed that its records on the matter were incomplete; relied in good faith on the limited information it had available to it when filing a response with the Commission; and did not represent to the Commission otherwise." Motion to Strike, at 7-8.

DISCUSSION

10. *Procedural Issue*. Before ruling on the substantive merits of Ebbert's application for review, we must first decide whether or not to consider the transcripts and audiotape submitted by Ebbert. *See* paragraph 4, *supra*. As pointed out by DCC, Ebbert makes no showing that this evidence was unavailable previously.

11. Both 47 U.S.C. §155(c)(5) and Section 1.115(c) of our Rules bar consideration of applications for review to the extent they rely on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. Rather, new questions of fact or law should be presented to the designated authority issuing the initial determination, subject to the requirements of Section 1.106(b)(2). Indeed, we have on many occasions refused to consider new evidence presented for the first time in an application for review. *See, e.g., S. Derrickson Moore*, 47 RR 2d 384, 386 (1980).

12. However, where new material introduced at the Commission review level may undermine the basis of the earlier decision, the public interest in reviewing that material may outweigh the public interest in the orderly administration of the Commission's business fostered by 47 U.S.C. §155(c)(5) and 47 C.F.R. §1.115. *See WSTE-FM, Inc. v. FCC*, 566 F.2d 333 (D.C. Cir. 1977). In such cases, the Commission may consider the new matter or issues presented on its own motion. *See, e.g.*, 47 U.S.C. §155(c)(4) (providing, *inter alia*, that the Commission may, on its own motion, review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report or action taken pursuant to delegated authority.) *See also Little Rock RadioTelephone Co., Inc.*, 89 FCC 2d 400 (1982); *Garrett, Andrews & Letizia*, 88 FCC 2d 620 (1981). Ebbert charges that the new evidence at issue here calls into question whether DCC has misrepresented certain facts to the Commission in responding to her allegations. Hence, they call into question DCC's basic qualifications to

[14] DCC requests that this evidence be stricken, as Section 1.115(c) of the Commission's Rules prohibits the introduction of new facts or arguments in an application for review. DCC argues that Ebbert had three opportunities to present these transcripts and failed to do so. DCC also claims that the transcripts are unreliable and conflict with statements in earlier pleadings that promotional announcements had indeed been made.

[15] DCC cites *RKO General, Inc.*, 1 FCC Rcd 1081, 1084 (1986) and *Grayson Enterprises, Inc.*, 78 FCC 2d 936 (1980) for this proposition.

be a Commission licensee. Further, as Ebbert also argues, the instant case is based on allegations of a "pattern of misconduct." Under such circumstances, we believe that the public interest in making a fully informed decision on the serious allegations raised by Ebbert is paramount and we will, on our own motion, consider the issues raised by the newly submitted transcripts and audiotape.

13. *Lowest Unit Charge.* Ebbert claims that the Bureau erred in failing to resolve her allegations that WHFS violated the "lowest unit charge" provisions of Section 73.1942 in approving the instant assignment application. According to Ebbert, "[t]he fact that the political broadcasting violations were being considered in another proceeding does not justify the failure to resolve these allegations, particularly when the conduct at issue took place in 1990." Application, at 11. Ebbert states that "[i]t is manifestly improper to find the pattern of misconduct insufficient to require [designation] while excluding important parts of the misconduct from analysis."

14. We disagree. As noted by DCC, Ebbert's lowest unit charge complaint was filed apart from and prior to her petition to deny and was merely incorporated by reference in the petition. Furthermore, DCC had responded to the Bureau's inquiry letter concerning the complaint prior to the filing of the WHFS assignment application. Finally, the two lowest unit charge violations alleged by Ebbert -- overcharges to candidates Pat Claggett and Donald Schaeffer, involving, according to DCC, a total of $1,706.00 -- are not by themselves serious enough either to warrant designation on their own account or to convince us that the Bureau committed reversible error in not resolving them prior to grant of the instant assignment.[16] However, as stated *supra*, we are mindful of Ebbert's claim that DCC engaged in a pattern of misconduct that hinges on the inclusion of all pertinent rule violations. Therefore, the evidence in the lowest unit charge enforcement matter will be made part of the record in this enforcement proceeding that will be referred to the Bureau and will be considered in conjunction with the other violations.

15. *Directional antenna.* Ebbert charges that the Bureau "inexplicably" failed to rule on its allegation that WHFS had made technical modifications to its antenna which had the effect of unlawfully "directionalizing" its signal in the direction of Washington without "overmodulation" or increasing signal strength beyond its authorized power.[17] DCC claims that, while the Bureau did not discuss in detail Ebbert's claim regarding the WHFS antenna pattern, "it is clear from the decision that the Staff was aware of and considered both Ebbert's and [DCC's] arguments on this issue .... Ebbert's claim concerning the antenna was obviously one of several issues' referenced generally by the [Staff] as requiring "little discussion ... because the violations clearly have not been established." Opposition to Application for Review, at 22-23, *quoting* Letter Ruling, at 8.

16. The Bureau summarized the contentions of the parties regarding Ebbert's claim that WHFS has, through the use of "parasitic elements" on its antenna, unlawfully directionalized its signal to provide better coverage of Washington, D.C.[18] On each of Ebbert's other allegations, the Bureau made a formal finding either: (i) that the violation "clearly had not been established" or had been admitted by DCC, *see* Letter Ruling at 8-9; or (ii) that Ebbert had established the alleged violation, *see* Letter Ruling, at 16. However, Ebbert is correct that the Bureau made no explicit determination with respect to the directional antenna issue. Therefore, we will examine the allegation *de novo* here.

17. Ebbert bases her claim on an exhibit submitted with her August 11, 1993 Reply, which contained a declaration from engineer John Mullaney. Mr. Mullaney attached a photograph and the manufacturer's schematic diagram of the WHFS antenna configuration. He points out the "parasitic" reflecting elements mounted behind each of the six bays on the antenna and states that such "are commonly associated with directional antenna patterns which require approval from the FCC prior to use." Mullaney Declaration, at 2.[19]

18. In its "Conditional Response to New Matter" filed on September 14, 1993, DCC submits a statement of James H. Kemman, a representative of Electronics Research, Inc. ("ERI"), which manufactured the WHFS antenna in 1989. While not quarreling with Mullaney's photographic and pictorial representations of the WHFS antenna, Kemman states that "it is well known" among practitioners that mounting an FM antenna on the side of a steel pole (as is the case here) can distort a station's predicted radiation pattern.(d![20] Kemman declaration, at 1. Kemman states that "it is ERI's understanding that the use of one or more parasitic elements for the purpose of reducing the pattern-distorting effects of a steel support structure upon a non-directional antenna ... is a good engineering practice which is acceptable under the FCC's current Rules and Regulations." *Id.* at 2. Kemman also states that "the WHFS antenna patterns were measured at the ERI antenna range, using the same equipment and procedures routinely em-

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[16] The Bureau has traditionally treated violations of the lowest unit charge provisions of its rules as warranting sanctions short of designation for revocation. *See e.g., KAYS, Inc.*, 43 FCC 2d 1183 (1973), *Outlet Communications, Inc.*, 70 RR 2d 818 (1992), and *Chronicle Publishing Co.*, 70 RR 2d 206 (1991) (involving overcharges to legally qualified candidates on 11, 14 and 98 occasions, respectively, and resulting in fines of $5,000, $10,000 and $25,000). Although designation is an appropriate sanction if the violation is serious enough, *see Declaratory Ruling Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511, 7514 (1991), *aff'd on recon .*, 7 FCC Rcd 4123 (1992), the overcharges alleged here, even if true, are within the range of violations that would merit less severe action.

[17] In its September 14, 1993 "Conditional Response to New Matter," DCC claimed that WHFS' antenna configuration was constructed in accordance with the standards of good engineering practice and did not unlawfully directionalize.

[18] DCC claimed below, and reiterates here, that the antenna modifications were made solely for the purpose of "smoothing out and circularizing signal distortions caused by the antenna's supporting structure." Opposition, at 22.

[19] Mullaney admits that non-directional stations may use such elements to smooth out or reduce pattern distortion created by the antenna mounting structure. However, he states, any such use must be based upon the same measurement techniques required by directional FM stations under 47 C.F.R. §73.316, although the pattern need not be submitted to the agency.

[20] WHFS's antenna is mounted on the pole beneath the antenna of WFSI-FM, Annapolis.u

ployed for that purpose." *Id.* at 1. The tests were set up to approximate as closely as possible the actual mounting and configuration of the WHFS antenna, "includ[ing] the effects of the antenna supporting structure, the step pegs' [or parasitic reflecting elements], mounting hardware, and the coaxial feed line." However, as Ebbert indicates in her September 29, 1993 "Opposition" to the Conditional Response, Mr. Kemman did not include or report the specific results of those tests.[21]

19. On January 17, 1995, the Bureau wrote DCC and requested a copy of both the antenna measurement data referenced by Mr. Kemman and the Air Technologies antenna performance report. This information was submitted on January 27, 1995 and supplemented on February 6, 1995.[22] The material now before us leads us to conclude that the parasitic reflecting elements Ebbert notes in fact exist for the purpose of circularizing signal distortions caused by WHFS's antenna supporting structure and that WHFS has not unlawfully directionalized its antenna.

20. Ebbert has submitted only the Air System Technologies report as evidence of the charge that WHFS may have unlawfully directionalized its antenna. This report was produced based on measurements from an airplane. It includes no discussion of the methodology used to generate the report and, therefore, it is impossible to gauge its accuracy and reliability in calculating the antenna's radiated power.[23] The ERI antenna measurement report submitted by DCC in January 1995, on the other hand, was generated with the WHFS antenna pole-mounted, paralleling its actual installation. It indicates that the antenna configuration currently used by WHFS is intended to and in fact does create an essentially circular radiation pattern. On the basis of such evidence, we must conclude that Ebbert has failed to raise ap substantial and material question of fact regarding WHFS' signal orientation such that further inquiry is called for in an evidentiary hearing. *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987), *citing Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392 (D.C. Cir. 1985).

21. *Sponsorship Identification/Lack of Candor.* 47 C.F.R. §73.1212 states that, "[w]hen a broadcast station transmits any matter for which money, service, or other valuable consideration" is received, the public is entitled to be so informed. Ebbert claims that the Bureau erred when it refused to conclude that WHFS aired promotional announcements which failed to identify the sponsors of the U2, Clash, and Peter Gabriel concert trips. *See* note 11, *supra*. She also claims that DCC has been less than candid in attempting to discredit her assertions. WHFS has denied any impropriety and submitted several "on-air scripts" to attack the credibility of transcripts submitted by Ebbert.[24]

22. Specifically, DCC stated in its Opposition that:

> Ebbert claims that these transcripts show that the alleged sponsors were not identified in on-air announcements. As stated truthfully in its Conditional Response, [DCC] believed to the best of the recollection of its personnel and based on those records which are available, that these promotions identified the sponsor to the extent required by the FCC's rules. Most of the records documenting these promotions are no longer available, so [DCC] is unable to verify several of Ebbert's transcripts' accuracy. However, included in Exhibit 1 attached hereto are several records which the station did retain, specifically the on-air scripts that were used for the Sara McClachlan [sic], U-2 Trip, U-2 cd giveaway and Billy Bragg trip promotions. The scripts clearly show that these record artists' labels were identified in promotional announcements.[21]
>
> Footnote 21: Based on this evidence, [DCC] seriously doubts the reliability of Ebbert's transcripts.

DCC Opposition, at 8-9.

23. When challenged by Ebbert's submission of an audiotape in her reply, DCC responded:

> Its rebuttal of Ebbert's charges [was] based on the limited documentation which is available and the best, good faith recollection of those employees still at WHFS familiar with the subject matter. [DCC] disclosed those limitations to the Commission... Ebbert's claim that [the transcripts submitted by DCC to counter her transcripts of the subject promotional announcements were false or were altered] is simply untrue. The scripts were not verbatim "transcripts" of any taped recordings and [DCC] did not represent that they were. They were exactly what [DCC] said they were: "scripts that were used for the Sara McLachlan, U-2 Trip, U-2 CD Giveaway and Billy Bragg Trip promotions." Based on these scripts and its employees' recollection, [DCC] concluded in good faith that to the extent any sponsorship iden-

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[21] In the September 29 pleading Ebbert claims that WHFS intended all along not to "smooth out" its antenna pattern, *see* note 17, *supra*, but instead to directionalize toward Washington. Ebbert also indicates that an organization known as "Air Technologies" was hired to verify the antenna pattern to determine "how far the new pattern was pushing the signal out beyond the scope of the full circle," *see* Ebbert declaration, at 30, and that its report showed that the station, which is licensed to operate with 50,000 watts, was radiating 120,000 watts in the direction of Washington and 140,000 watts in the direction of Baltimore. As discussed below, however, the accuracy and reliability of the report cannot be determined. *See* para. 20, *infra*.

[22] The Company which performed the 1990 antenna tests is actually Air System Technologies of Dallas, Texas.

[23] A large number of variables -- antenna orientation, input and output power, source antenna gain, ground reflections, and the presence of the airplane itself -- must be taken into account, which makes airplane calculations of radiated power extremely difficult.

[24] DCC maintains, as it has throughout the proceeding, that Ebbert has not demonstrated that its compact disc and concert trip promotions required sponsorship disclosure, stating that: (i) it is well established that a station's use of records and other merchandise which record companies provide does not require sponsorship identification unless there is evidence that the extra copies or merchandise were provided in consideration for airplay, citing *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990); and (ii) while Ebbert alleges that the trips and compact discs were given to WHFS in return for airplay, she presents no confirming evidence. DCC is correct that Ebbert makes no representations concerning the source of the gift records awarded during the compact disc giveaways. However, we conclude that the concert trip promotions in fact required sponsorship identification and that DCC failed to make such identification. *See* para. 24 *infra*.

> tification of record companies was required under the Commission's Rules, such disclosures were made in these cases.

Motion to Strike, at 6-7 (footnotes omitted). Even if Ebbert's tape is accurate, continues DCC, "[a]t most, the tape shows that some WHFS announcers may have deviated from prepared scripts when they announced certain promotions." *Id.* at 7.

24. *Discussion.* We conclude that DCC did, in fact, violate the sponsorship identification rule. The "on-air scripts" submitted by DCC indicate that record companies at least partially sponsored Sarah McLachlan, U-2, and Billy Bragg trips in conjunction with the station. To the extent that any consideration flowed to the station from the record companies to air announcements promoting these concerts, the sponsors should have been identified. While Ebbert did not demonstrate specifically what consideration was given to WHFS for airing the spots (such information being particularly within the knowledge of the station), she did state that "extra copies" of the artists' records were given to the station and that "airplay" of the records was necessary because listeners had to hear the particular artists' songs before calling in as contestants. DCC does not dispute these allegations. The totality of the circumstances therefore indicates that the record companies should have been identified as sponsors of the promotional announcements and that DCC failed to make the proper identification. Accordingly, this matter will be referred to the Mass Media Bureau's Enforcement Division for appropriate action. Nonetheless, we conclude that DCC's pleadings on this issue evidence neither a "lack of candor" characterized by "concealment, evasion, and other failures to be fully informative" nor a "misrepresentation" or false statement of facts. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Rather, DCC's responses on the sponsorship identification issue simply appear to be incorrect. Though, on the occasionsh) specified by Ebbert, the sponsors of promotional announcements were not identified, there is no evidence to suggest that DCC knew that fact and intentionally attempted to conceal it from the Commission. On the contrary, it appears that DCC honestly and reasonably believed that its announcers followed the "on-air scripts" prepared for their use. Under these circumstances, there is no basis for finding a substantial and material question of fact concerning a lack of candor.

25. *Contest Prizes.* The Bureau found that, because Ebbert did not identify with specificity the prizes which she claimed were not awarded in the "$30,000 in Cash and Prizes," "June Music Month," and "Halloween" contests, it could find no violation of Section 73.1216 of the Rules. Letter Ruling, at 14-15. *See note* 9, *supra.* Ebbert claims on appeal that she did in fact identify such prizes:

> With respect to "$30,000 in Cash and Prizes," the prizes were identified as cash, trips, compact disc players, and concert tickets. In the "June Music Month" contest, over 200 compact discs and eight compact disc players were not awarded. With respect to the "Halloween" contest, Ebbert specifically declared that the trips to Jamaica were awarded only after repeated complaints from winners and advertisers. *See* Ebbert's September 29 declaration, pp. 23-25. It is clearly unreasonable to withhold the awarding of prizes until repeated complaints force the prize to be awarded.

Application for Review, at 10.

26. We find that Ebbert has not established that the Bureau erred in refusing to find a violation of Section 73.1216 with respect to the contests involved here. While she makes the general claim that certain prizes were not awarded, she provides no specific information regarding how, when and to whom the prizes were promised and what, if anything, was actually tendered.[25] Additionally, she provides no corroborating evidence from any listener complaining that (s)he had not received an announced prize. Finally, with respect to the "Halloween" contest trips to Jamaica, as admitted by Ebbert, the trips were in fact awarded. Though Ebbert argues that the amount of time involved in awarding the trips was "unreasonable," we are unwilling, in the absence of complaints from prize recipients and in light of DCC's defense that any delay was due to the "logistics" of arranging for the Jamaica trips, *see* Opposition to petition to deny, at 20, to find either that the station acted "unreasonably" or that it violated our rules regarding contest conduct.[26]

27. *Overall Licensee Conduct.* Ebbert's final allegation is that, "[w]hen all of the rule violations are considered, [she] has clearly made a *prima facie* case that the rule violations were sufficiently willful and repeated' to require designation for hearing." Application for Review, at 11. She states that WHFS' violations exceeded the number and scope of those which warranted designation in *Lewel* and *Fred*

[25] Ebbert was very specific in documenting DCC's failure to award announced prizes with respect to the "99 Gifts of WHFS mas" and "Oingo Boingo Tickets" contests. The Bureau found that DCC had violated Section 73.1216 with respect to those contests.

[26] Ebbert also claims that the "Birthday Bash" promotion was "unsupervised," that prizes "were not awarded in accordance with the contest guidelines or age restriction rules as originally advertised," and that WHFS "mislead its audience regarding material terms of this contest by continually changing the method of winning the prizes without notifying its listening public." Reply declaration, at 8. Ebbert provides no evidence to support these claims, save for transcripts and tape of two WHFS announcements regarding the "Birthday Bash": one explaining the new prize (tickets) distribution rules and the other advising parents that WHFS disclaimed responsibility for children "cutting class" and attempting to get the gift concert tickets during the school day. The latter announcement noted that the station emphasized in its "Birthday Bash" promotions that "[A]ll contest winners on WHFS Radio must be 18 years of age or older." With respect to her allegation that contest rules were changed without notification to listeners, we hold that Ebbert's transcript indicates that listeners were in fact notified of rule changes. Finally, we agree with the Bureau that, given the dangerously large crowds converging at sponsor locations due to the huge but unanticipated listener response to the "Birthday Bash" ticket giveaway, "it is both unfair and unwise to penalize the station for altering the contest's rules to protect the health, safety, and property of its listeners and sponsors." Letter Ruling, at 15. Stations indeed have an affirmative duty to alter contest rules to protect the public. *See, e.g., Action Radio, Inc.*, 51 FCC 2d 811, 856 (I.D. 1973), *citing Public Notice*, "Contests and Promotions which Adversely Affect the Public Interest," 2 FCC 2d 464 (1966).

Kaysbier, supra, cited by the Bureau. Ebbert states that DCC's misconduct was "willful" in the sense that DCC "knew it was performing the act in question -- there is no requirement that the licensee know it was acting wrongfully in order for a violation to be willful. *Midwest Radio-Television,Inc.*, 45 FCC 1137, 1141 (1963)."

28. As correctly noted by the Bureau, the Commission is usually hesitant to designate a renewal or assignment application for evidentiary hearing on grounds of technical or legal violations in the absence of misrepresentation or lack of candor. However, it has, for example, designated issues for "willful and repeated" violations of Commission legal and technical requirements, *see Lewel Broadcasting, Inc.* and *Fred Kaysbier*, where the licensee's station operation "was conducted in an exceedingly careless, inept and negligent manner and [where] the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." *See Heart of the Black Hills Stations*, 32 FCC 2d 196, 198 (1971).[27] Additionally, issues have been specified where "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. *See also Center for Study and Application of Black Economic Development*, 6 FCC Rcd 4622 (1991), *Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4037 (1992).

29. In the instant case, as stated above, the evidence does not raise a substantial and material question of fact as to whether DCC lacked candor in its responses and arguments. We thus must decide whether or not the rule violations alone were "so serious in themselves to warrant designation." *See, e.g., KMAP, Inc.*, 63 FCC 2d 470, 478 (1979), *recon. denied*, 72 FCC 2d 241 (1979) (petitioner's arguments concerning lottery, sponsorship identification, and logging violations do not in themselves warrant an evidentiary hearing); *Mark R. Nalbone, Receiver* 6 FCC Rcd 7529 (1991).

30. On balance, we agree with the Bureau that the violations, while serious, do not, taken individually or as a whole, rise to the level which would require an evidentiary hearing. We concur that DCC's stewardship of WHFS, while certainly not commendable, was not "conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable or unwilling to correct the operating deficiencies," *see Lewel Broadcasting, Inc.* and *Fred Kaysbier, supra*. DCC in fact took steps to correct many of the admitted violations, albeit after the filing of Ebbert's petition.[28] Neither can we say that the "number, nature and extent" of the violations indicates that DCC cannot be relied upon to operate in accordance with the requirements of its licenses and the Commission's rules, *see Heart of the Black Hills Stations, supra*. WHFS maintained an adequate technical service throughout the period involved here, *see id*, and there is no evidence in the record here to indicate that DCC would continue the listed violations in spite of Commission warnings or forfeitures. *Id. See also Center for Study and Application of Black Economic Development, supra*. Rather, we believe that DCC's violations are best handled as part of a separate enforcement proceeding. *See, e.g., Lakes Area Broadcasting Co.*, 48 FCC 2d 640 (1974) (forfeiture, rather than designation, is adequate sanction for rules violations); *see also Eastern Carolina Broadcasting Co. v. FCC* and *Citizens for Jazz on WRVR, Inc. v. FCC, supra*. Accordingly, each of the matters previously found by the Bureau to have been either admitted or established (including the lowest unit charge violation), as well as the additional sponsorship identification violations found in paragraphs 21-25, *supra*, have been referred to the Bureau's Enforcement Division for further action.

31. Accordingly, IT IS ORDERED, That DCC's Motion to Strike Ebbert's Reply IS GRANTED to the extent that material contained therein was not presented to the Bureau, but that evidence submitted with the Reply IS ADMITTED *sua sponte* pursuant to the discussion in Paragraphs 11-12, *supra*.

32. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. §1.115(g), EBBERT's Application for Review IS DENIED, and grant of the application (File No. BALH-930528GI) to assign the license and sell the assets of station WHFS from DCC to Liberty IS AFFIRMED, subject to the following condition:

> Grant of this application is without prejudice to whatever action, if any, the Mass Media Bureau's Enforcement Division deems necessary in light of the rule violations referred to herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[27] *See also Order and Notice of Apparent Liability (WACB, Kitanning, Pennsylvania)*, FCC 78-354 (released May 24, 1978); *Order and Notice of Apparent Liability (WOMO/WLYT(FM), Cleveland Heights, Ohio)*, FCC 72-73 (released January 27, 1972); and *Stephen Van Sandler (KVLB)*, 28 FCC 2d 716 (1971).

[28] For example, DCC corrected: (i) its violation of the rules requiring that only licensed operators run the station's control board and that those licenses be posted; (ii) its operation of an unauthorized STL from WHFS' Landover studio; and (iii) its improper station identification announcements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
TCI of Illinois, Inc.	CUID No. IL0123 (Frankfort)
TCI Cablevision of Greater Michigan, Inc.	CUID No. MI0588 (Swan Creek)
TCI Cablevision of Ohio, Inc.	CUID Nos. OH0285 (Portage) and OH0286 (Catawba Island)
TCI Cablevision of Wyoming, Inc.	CUID No. WY0007 (Powell)
Benchmark Filings to Support Cable Programming Service Prices	

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 1995; Released: June 21, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For all of the communities at issue in this Order, Operators' actual CPS tier prices were above the maximum permitted prices that they calculated for the CPS tier and, thus, Operators failed to demonstrate that their prices for the CPS tier were not unreasonable. Furthermore, upon review of Operators' submissions, we have found that in every case they miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c)

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $1.54 to $18.41. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II,

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[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19-20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $23.30 to $29.11.

[18] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

Worksheet 3, Line 301.[21] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. On its Form 393 filing for CUID No. IL0123, the Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of December 1993. However, the Operator cannot permissibly calculate inflation through the end of December 1993. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than November 16, 1993.[22] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[23] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[24] On July 29, 1994, the U.S Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator should have used in justifying its rate for CUID No. IL0123, of 1.030.

f. On its Form 393 filing for CUID No. WY0007, the Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of December 1993. However, the Operator cannot permissibly calculate inflation through the end of December 1993. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than December 2, 1993.[25] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through November 1993.[26] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[27] On July 29, 1994, the U.S Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through November 1993, the base date the Operator should have used in justifying its rate for CUID No. WY0007, of 1.032.

g. Because the Operators for CUID Nos. OH0285, OH0286, and MI0588 have failed to demonstrate that their prices for the CPS tier were not unreasonable, we will set maximum permitted prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operators filed.[28] On their amended Form 393s, Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operators used in justifying their rates, of 1.030. 6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[29]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

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[21] This adjustment to Worksheet 1 has the effect of causing Operators in some franchise areas to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. In those franchise areas where Operators did not file a Worksheet 2 and one is needed, we have computed Worksheet 2 by using data supplied by Operators on their Form 1200 filings.

[22] *See* 47 C.F.R. § 76.956(a).

[23] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[24] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[25] *See* 47 C.F.R. § 76.956(a).

[26] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[27] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[28] *Id.*

[29] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[30] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[31]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
IL0123	10/21/93	10/17/93
MI0588	2/3/94	2/1/94
OH0285	11/29/93	11/17/93
OH0286	11/26/93	11/22/93
WY0007	11/15/93	11/2/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
IL0123	$10.15	$ 9.76
MI0588	$10.78	$10.07
OH0285	$11.34	$10.56
OH0286	$11.34	$10.56
WY0007	$ 3.43	$ 3.27

[30] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[31] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Cupertino/Los Alto, California	CUID No. CA0843 (Cupertino)
TCI of Central Iowa, Inc.	CUID No. IA0036 (Des Moines)
TCI Cablevision of Treasure Valley, Inc.	CUID No. ID0056 (Boise)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 1995; Released: June 21, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise areas designated by CUID Nos. CA0843 and IA0036, we have found no apparent errors in the Operators' calculation of their maximum permitted rates. However, the Operators' actual CPS tier prices were above the maximum permitted prices that the Operators calculated for the CPS tier. Accordingly, the Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operators filed:[12]

> On their amended Form 393s, the Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.b

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

> Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operators used in justifying their rates, of 1.030.

6. For the franchise area designated by CUID No. ID0056, we have found no apparent errors in the Operator's calculation of its maximum permitted rate. However, the Operator's actual CPS tier price was above the maximum permitted price that the Operator calculated for the CPS tier. Accordingly, the Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operator filed:[13]

> On its amended Form 393, the Operator calculated the Inflation Adjustment Factor as of the end of March 1994 using data released on March 31, 1994. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 127.5 for the first quarter of 1994. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through March 1994, the base date the Operator used in justifying its rate, of 1.043.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[14] However, we further determine that for CUID Nos. IA0036 and ID0056, the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order refunds in these franchise areas.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID Nos. IA0036 and ID0056, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[15] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[16]

12. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
CA0843	9/22/93	9/16/93
IA0036	2/24/94	2/24/94
ID0056	4/4/94	3/25/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
CA0843	$10.93	$10.18
IA0036	$11.79	$11.68
ID0056	$11.17	$10.86

[13] *Id.*

[14] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[16] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Community TV Corporation — CUID No. NH0047 (Merrimack)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 1995; Released: June 21, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaint in the franchise area which is the subject of this Order was served on Operator and received by the Commission on September 7, 1993. Operator filed an FCC Form 393 on February 4, 1994.

5. On November 15, 1993, Operator filed a Motion to Dismiss the complaint filed on September 7, 1993. In its motion, Operator requests that the Commission dismiss the complaint on several grounds. First, Operator argues that the complaint should be dismissed because the complainant failed to complete question number 8 on FCC Form 329 as it then existed. Second, Operator argues that, in response to question number 9, the complainant improperly listed channels that were sold on the basic service tier and on a per-channel basis, as well as channels that were offered on the CPS tier. Third, Operator argues that the complaint should be dismissed since the attachments to the complaint indicate that the complainant was concerned primarily with an increase in the monthly franchise fee.

6. Operator assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier, and because complainant's response to question number 6 indicates that he objected to the rate in effect on September 1, 1993, we find it reasonable to conclude that the complainant objected to the CPS tier rate, not merely the franchise fee, and that he believed that rate was unreasonable. We therefore find the complaint valid and deny Operator's Motion to Dismiss.

7. In its benchmark filing of February 4, 1994, Operator calculated a maximum permitted rate for the CPS tier of $10.09 per month (plus franchise fee). However, Operator's actual monthly charge for the CPS tier was $10.43 (plus franchise fee). Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of Operator's submission, we have

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

found that Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Operator's calculations in its Form 393:

> On its Form 393 filing, Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of February 1994. However, Operator cannot permissibly calculate inflation through the end of February 1994. Based on the service date of the earliest valid complaint, Operator was required to file a rate justification no later than November 15, 1993. If Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[11] Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator should have filed Form 393.[12] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator should have used in justifying its rate, of 1.030.

8. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $9.79 per month (plus franchise fee) for the period from September 7, 1993 to May 14, 1994.[13]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the motion of Operator to dismiss the complaint filed on September 7, 1993 against its cable programming service price charged in the franchise area referenced in the caption IS DENIED.

10. IT IS FURTHER ORDERED that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from September 7, 1993[14] to May 14, 1994 which exceeded the maximum price of $9.79 per month (plus franchise fee), plus interest to the date of the refund.

12. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

13. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $9.79 (plus franchise fee).[15]

14. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[11] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[12] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This finding is based solely on the representations of Operator and the modification described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[15] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	CUID Nos. NJ0032 (Wildwood)
	NJ0094 (Cape May)
	NJ0095 (West Cape May)
	NJ0096 (Cape May Point)
TKR Cable Company of	NJ0097 (Lower Township)
Wildwood	NJ0098 (Middle Township)
	NJ0099 (West Wildwood)
Benchmark Filing to Support	NJ0100 (Wildwood Crest)
Cable Programming	NJ0101 (North Wildwood)
Service Price	

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 1995; Released: June 21, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above (the "subject communities"). Operator responded to the complaints by filing a benchmark showing on March 28, 1994. In its response, Operator argued that the a la carte package which it created prior to September 1, 1993 was not subject to rate regulation.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

4. When Operator restructured its rates and tiers prior to September 1, 1993 to conform to the Commission's regulations, it eliminated its CPS tier in each of the subject communities and placed those CPS channels into either the basic tier or an a la carte package. Specifically, on August 31, 1993, Operator restructured its service offerings by collapsing its ten-channel CPS tier and transferring six of the program services to the basic tier and four to an a la carte package.[10]

5. On June 1, 1995, the Cable Services Bureau released an order resolving Operator's consolidated appeal of eight local rate orders adopted by the franchising authority, the New Jersey Board of Public Utilities, Office of Cable Television (the "Board").[11] Operator's appeal challenged the Board's determination that the a la carte packages offered by Operator on eight of its systems, including the system serving the subject communities, were to be treated as regulated offerings for purposes of rate regulation.

6. In resolving Operator's appeal, we noted that the facts presented by Operator on appeal were similar to the facts presented in our letter of inquiry ("LOI") orders where we ruled that certain a la carte packages may be treated as new product tiers.[12] For example, in *TKR Cable of Hamilton*,[13] we found that we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 1226 (994) (*"Going Forward Order"*).[14]

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] *Id.*

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] 47 C.F.R. § 76.922(b).

[7] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.* e

[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[10] Letter from Susan R. Athari, Esq. of Baraff, Koerner, Olender & Hochberg, P.C., attorney for TKR Cable Company of Wildwood, to William P. Agee, Esq., of the FCC (June 1, 1995).

[11] *See* TKR Cable Company, DA 95-1179 (Cab. Serv. Bur., released June 1, 1995).

[12] *See, e.g.*, Cablevision Industries, Long Beach, CA, LOI-93-40, DA 94-1424 (Cab. Serv. Bur., released Dec. 12, 1994)

[13] In TKR Cable of Hamilton, New Jersey, LOI-93-31, DA 94-1312 (Cab. Serv. Bur., released Nov. 25, 1994), we resolved the regulatory status of the a la carte package offered by Operator on its Hamilton, New Jersey system. The a la carte package at issue in *TKR Cable of Hamilton* was a four-channel package, comprised of channels formerly available on two cable programming services tiers.

[14] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going*

7. In our June 1, 1995 order, we found that the Board's determination, that Operator's a la carte packages at issue in the appeal are regulated tiers, is inconsistent with the action taken in *TKR Cable of Hamilton*. We further found that, in accordance with that order, Operator's a la carte packages in the subject communities should not be treated as rate-regulated tiers of service.[15] Therefore, we need not rule on the FCC Form 329 complaints filed against Operator in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993.

8. Accordingly, IT IS ORDERED that the a la carte packages created by Operator in the subject communities may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Operator in each of the subject communities ARE DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Forward Order at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[15] *See* TKR Cable Company, DA 95-1179 at para. 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Washington, Inc. CUID No. WA0002 (Bellingham)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1995; Released: June 21, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Texas, Inc. — CUID No. TX0217 (San Marcos)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1995; Released: June 21, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable CUID No. NC0007 (Charlotte)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1995; Released: June 21, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only the rate for equipment used to receive the basic service tier, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Kansas, Inc. CUID No. KS0042 (Manhattan)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1995; Released: June 21, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released Date: June 22, 1995

US WEST COMMUNICATIONS, INC., BEK COMMUNICATIONS I, INC., CTC COMMUNICATIONS, INC., DAKOTA CENTRAL TELECOM I, INC., DICKEY RURAL COMMUNICATIONS, INC., GILBY TELEPHONE COMPANY, GRIGGS COUNTY TELEPHONE COMPANY, INTER-COMMUNITY TELEPHONE COMPANY II, INC., MOORE & LIBERTY TELEPHONE COMPANY, NORTH DAKOTA TELEPHONE COMPANY, NORTHWEST COMMUNICATIONS COOPERATIVE, DRED RIVER TELECOM, INC., RTC II, INC., TURTLE MOUNTAIN COMMUNICATIONS, INC., WEST RIVER COMMUNICATIONS, INC., AND YORK TELEPHONE COMPANY ("15 INDEPENDENT TELEPHONE COMPANIES") FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF A "STUDY AREA" CONTAINED IN PART 36 APPENDIX-GLOSSARY AND SECTION 61.41(C)(2) OF THE COMMISSION'S RULES. AAD 95-72

Comment Date: July 28, 1995
Reply Date: August 11, 1995

On May 19, 1995, US West Communications, Inc. ("US West") and fifteen other telephone companies filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. US West has agreed to sell 68 North Dakota exchanges (48,400 access lines) to the 15 telephone companies. This waiver would allow petitioners to reflect the changes in their study area boundaries that would result from US West's sale of these telephone exchanges to the 15 telephone companies. The 15 telephone companies also seek waiver of Section 61.41(c) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt them from the price cap "all or nothing" rule and allow them to continue or begin to operate as cost companies in the National Exchange Carrier Association's common line and traffic sensitive pools. Finally, several of the 15 telephone companies seek average schedule status. The Petitioners state that they have received approval for this transaction by the North Dakota Public Service Commission.

Interested parties may file comments on the petitioners' petition on or before **July 28, 1995**, and reply comments on or before **August 11, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 95-72. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's ex parte rules. See generally, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: June 22, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Paramount Stations Group of Philadelphia, Inc.
Licensee, WTXF(TV)
330 Market Street
Philadelphia, PA 19106

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On March 29, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WTXF(TV), Philadelphia, PA (File No. BRCT-940401L3). In answer to Section II, Question 10(b) of that renewal application you state that during the previous license term WTXF(TV) did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 5 to your application you reveal that between January, 1992, and September, 1993, WTXF(TV) exceeded the commercial limits on children's programming on 52 occasions. Of these 52 commercial overages, 45 were thirty seconds in length; one was fifteen seconds in length; and six were program-length commercials thirty minutes in length. You state that all of the commercial overages were inadvertent, and resulted from human error on the part of various members of the station's staff; that 46 of the 52 violations "were brief, involving only overages of 30 seconds' duration or, in one case, 15 seconds"; that 42 of the 30-second overages and the single 15-second overage occurred between January and March of 1992, the first quarter that the children's television commercial limitations were effective; and that in March of 1992, WTXF(TV) instituted an additional review procedure to verify that the station's children's programming would comply with the commercial limitation rule. You infer that such additional review procedure has been effective because "[i]n the nearly two years since the first quarter of 1992, WTXF(TV) has experienced only a very few other occasions when the hourly limits were exceeded...."

WTXF(TV)'s record during the last license term of exceeding the Commission's commercial limits on children's television programming on 52 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Paramount Stations Group of Philadelphia, Inc. is hereby advised of its apparent liability for forfeiture in the amount of fifteen thousand dollars ($15,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993).[1]

[1] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993)(" *Policy Statement/Assessing Forfeitures*"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communica-

The 52 occasions on which WTXF(TV) exceeded the hourly limits on commercial matter during children's programming is a high number of violations. Moreover, although 46 of the overages were 30 seconds or less in duration, six of the overages were program-length commercials thirty minutes in duration. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18.

In addition, when the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...[and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties." *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that would have prevented Station WTXF(TV) from complying with the children's television commercial limitations during the last license period. Indeed, you admit that all of the cited violations occurred because of human error. Thus, in view of the violations described in your renewal application, it is apparent that WTXF(TV) initially did not establish an effective program to monitor compliance with the children's television commercial limitations. Further, although you infer that an additional children's advertising review procedure instituted in March of 1992 has been effective because subsequently there were "only a very few" further violations, those violations, including the six program-length commercials, did, in fact, occur. Thus, it is clear that WTXF(TV) did not establish effective compliance procedures until many significant overages occurred. Finally, the fact that WTXF(TV) may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $15,000.

You are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, no further action is required in this matter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure

cc: Barbara K. Gardner, Esq.

tions Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (adopted March 10, 1995, released April 5, 1995, FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (adopted March 10, 1995, released April 5, 1995, FCC 95-109)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Texas, Inc. — CUID No. TX0312 (Cuero)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1995; **Released: June 23, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Artists Enterprises, Inc.	CUID No. CA1091 (Moreno Valley)
Chino Valley Cablevision, Inc.	CUID Nos. CA1151 (Chino Hill) and CA1226 (City of Chino)
TCI Cablevision of Wisconsin, Inc.	CUID No. IL0627 (Village of Richmond)
TCI of Central Indiana, Inc.	CUID No. IN0074 (Anderson)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1995; Released: June 23, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise area designated by CUID No. CA1091, the Operator's actual CPS tier price was above the maximum permitted price that the Operator calculated for the CPS tier and, thus, the Operator failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of the Operator's submission for this franchise area, we have found that the Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to the Operator's calculations in its Form 393:

> a. On Line 101, Worksheet 1 of Form 393, the Operator states that it has 22 channels on its basic service tier and 28 channels on its CPS tier. The attached September 1993 channel line-up indicates that the Operator actually had 23 channels on its

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

basic service tier and 27 channels on its CPS tier. Accordingly, we have revised these entries on Line 101.

b. Because the Operator has not demonstrated that its price in this franchise area was reasonable, we must also recalculate the Inflation Adjustment Factor using the most accurate data currently available for the date for which the Operator filed.[12] The Operator on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator used in justifying its rate, of 1.030.

6. For the franchise area designated by CUID No. IN0074, the Operator's actual CPS tier price was less than the maximum permitted price that the Operator calculated for its CPS tier. However, upon review of the Operator's submission for this franchise area, we have found that the Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to the Operator's calculations in its Form 393:

a. On Line 108, Worksheet 1 of Form 393, the Operator entered $23,918.20 as its monthly franchise fee expense. However, the Operator's September 1993 rate card indicates that the rates entered on Line 101 do not include franchise fees. Accordingly, we changed Line 108 to $0.00.[13]

b. Because the Operator has not demonstrated that its price in this franchise area was reasonable, we must also recalculate the Inflation Adjustment Factor using the most accurate data currently available for the date for which the Operator filed.[14] The Operator on its amended Form 393 calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator used in justifying its rate, of 1.030.

7. For the franchise area designated by CUID No. IL0627, the Operator's actual CPS tier price was above the maximum permitted price that the Operator calculated for the CPS tier and, thus, the Operator failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of the Operator's submission for this franchise area, we have found that the Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to the Operator's calculations in its Form 393:

On its Form 393 filing for CUID No. IL0627, the Operator calculated the Inflation Adjustment Factor as of the end of March 1994. However, the Operator cannot permissibly calculate inflation through the end of March 1994. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than March 28, 1994.[15] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through February 1994.[16] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[17] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through February 1994, the base date the Operator should have used in justifying its rate for CUID No. IL0627, of 1.039.

8. For the franchise areas designated by CUID Nos. CA1151 and CA1226, we have found no apparent errors in the Operator's calculation of its maximum permitted rate. However, the Operator's actual CPS tier price was above the maximum permitted price that the Operator calculated for the CPS tier. Accordingly, the Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operator filed:[18]

On its amended Form 393, the Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993.

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[12] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This adjustment to Worksheet 1 has the effect of causing the Operator to calculate its permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. Since the Operator did not file a Worksheet 2 we have computed Worksheet 2 by using data supplied by the Operator on its Form 1200 filing.

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] *See* 47 C.F.R. § 76.956(a).

[16] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[18] *Id.*

On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator used in justifying itsrate, of 1.030.

9. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[19]

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[20] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

12. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

13. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[21]

14. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
CA1091	10/12/93	10/8/93
CA1151	2/23/94	2/18/94
CA1226	10/15/93	10/12/93
IL0627	2/24/94	2/24/94
IN0074	10/25/93	10/21/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
CA1091	$11.96	$10.60
CA1151	$10.55	$10.09
CA1226	$10.55	$10.09
IL0627	$10.75	$ 9.98
IN0074	$11.22	$11.03

[19] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[20] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[21] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of California, Inc. CUID No. CA0206 (San Mateo)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 1995; Released: June 23, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc., AAD 93-126

Petition for Authorization to Perform Additional Activities

ORDER

Adopted: June 19, 1995; Released: June 23, 1995

By the Chief, Accounting and Audits Division:

1. On June 8, 1995, the National Exchange Carrier Association, Inc., ("NECA") filed a motion to dismiss its petition for authorization to perform additional services and terminate the captioned proceeding. NECA states that it wants to review and update the scope of the services for which it has requested authorization.

2. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291, that NECA's motion to dismiss its petition IS GRANTED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-100

In the Matter of

Amendment of Section 73.202(b), RM-8635
Table of Allotments,
FM Broadcast Stations.
(Blackstone and Dillwyn, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 7, 1995; Released: June 23, 1995

Comment Date: August 14, 1995
Reply Comment Date: August 29, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Denbar Communications, Inc. ("petitioner"), licensee of Station WBBC(FM), Channel 228A, Blackstone, Virginia, requesting the substitution of Channel 228C3 for Channel 228A at Blackstone and modification of petitioner's license to reflect the higher powered channel. In order to accommodate the upgrade at Blackstone, petitioner also requests the substitution of Channel 287A for vacant Channel 229A at Dillwyn, Virginia. Petitioner states that it will apply for Channel 228C3 at Blackstone, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 228C3 for Channel 228A at Blackstone, since it could provide the community with a wide coverage area FM service. Channel 228C3 can be allotted to Blackstone in compliance with the Commission's minimum distance separation requirements, provided that Channel 287A is substituted for vacant Channel 229A at Dillwyn, Virginia, with a site restriction of 15 kilometers (9.3 miles) northwest.[1] Channel 228C3 can be allotted to Blackstone at the site specified in Station WBBC(FM)'s license.[2] As requested, we shall propose to modify the license of Station WBBC(FM) at Blackstone, Virginia, to specify operation on Channel 228C3 in lieu of Channel 228A in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Blackstone, Virginia	228A	228C3
Dillwyn, Virginia	229A	287A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 14, 1995**, and reply comments on or before **August 29, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

M. Scott Johnson, Esq.
Lauren Drake, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900E
Washington, D.C. 20005
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] The coordinates for Channel 287A at Dillwyn are North Latitude 37-35-18 and West Longitude 78-37-01.
[2] The coordinates for Channel 228C3 at Blackstone are North Latitude 37-03-14 and West Longitude 78-01-15.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-23[1]

In the Matter of

Amendment of Section 73.202(b),	RM-8578
Table of Allotments,	
FM Broadcast Stations.	
(Madisonville, Texas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 14, 1995; Released: June 23, 1995

By the Chief, Allocations Branch:

1. At the request of Leon Hunt, d/b/a Hunt Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 2097 (1995), proposing the allotment of Channel 272A to Madisonville, Texas, as the community's second local commercial FM service. Petitioner filed comments.[2] Petitioner also filed reply comments restating its interest in applying for a Class A channel at Madisonville, if allotted. No other comments were filed.

2. Petitioner now suggests the allotment of Channel 263A instead of Channel 272A due to tropospheric propagation and temperature inversions that are more pronounced on Channel 272A. It notes that listening tests indicate that there would be less interference to the surrounding areas of Madisonville if Channel 263A is allotted in lieu of Channel 272A. Furthermore, petitioner notes that the allotment of Channel 263A meets all the separation requirement of Section 73.207 of the Commission's Rules.

3. We believe the public interest would be served by allotting a channel to Madisonville, Texas, and that it is preferable to allot Channel 263A rather than Channel 272A, since there may less potential interference. Channel 263A can be allotted to Madisonville in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.0 kilometers (5.0 miles) northwest to avoid a short-spacing conflict with the licensed site of Station KILT(FM), Channel 262C, Houston, Texas.[3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 7, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Madisonville, Texas	241C2, 263A

5. The window period for filing applications will open on **August 7, 1995**, and close on **September 7, 1995**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] On February 21, 1995, the Commission released a Notice of Proposed Rule Making in this proceeding, assigning MM Docket No. 95-30. By *Erratum* released February 28, 1995, the Commission corrected the docket number to read MM Docket No. 95-23 in lieu of MM Docket No. 95-30.

[2] Although petitioner filed a pleading styled as a counterproposal, we do not considered petitioner's alternate channel suggestion to be a counterproposal, since it does not introduce a new community or propose a higher class allotment than proposed in the *Notice*. *See Clinton, Saint Pauls and Southern Pines, North Carolina and Chesterfield, South Carolina*, 6 FCC Rcd 4370 (1991).

[3] The coordinates for Channel 263A at Madisonville are North Latitude 31-00-50 and West Longitude 95-57-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-16

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Leone, American Samoa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 12, 1995; Released: June 23, 1995

By the Chief, Allocations Branch:

1. The Commission, on its own motion, has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 1557 (1995), which proposed the deletion of Channel 266C1 from Leone, American Samoa, in order to remove the conflict with a recently assigned FM station on Channel 266A in Western Samoa. The Commission also proposed the allotment of Channel 230C1 to Leone if an interest in operating a Class C1 station was expressed during the pendency of the rule making. In response to the *Notice*, Charles M. Harker filed comments stating an intention to apply for Channel 230C1, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 230C1 to Leone since an interest has been expressed in its use. Channel 230C1 can be allotted in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 7, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Leone, American Samoa	230C1

4. The window period for filing applications will open on **August 7, 1995**, and close on **September 7, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 230C1 at Leone are -14-20-38 South Latitude and 170-47-06 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-98

In the Matter of

Amendment of Section 73.202(b) RM-8603
Table of Allotments,
FM Broadcast Stations.
(Cheyenne and Saratoga, Wyoming)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 12, 1995; Released: June 23, 1995

Comment Date: August 14, 1995
Reply Comment Date: August 29, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making jointly filed by Rule Communications ("Rule") and KRAE, Inc. ("KRAE") (jointly referred to as "petitioners"), requesting the allotment of Channel 260A at Cheyenne, Wyoming as the community's fifth local FM transmission service.[1] To accommodate the allotment, petitioners request the deletion of vacant Channel 260C at Saratoga, Wyoming, or in the alternative, the substitution of Channel 277C for vacant Channel 260C at Saratoga. Petitioners also request that if Channel 260A is allotted, Rule be allowed to amend its mutually exclusive application for Channel 285A at Cheyenne to reflect the new channel. Rule states its intention to apply for Channel 260A, if allotted to Cheyenne with cut-off protection.

2. In support of their proposal, petitioners state Rule (File No. BPH-930923ME) and KRAE (File No. BPH-930924MC) have mutually exclusive applications pending for Channel 285A at Cheyenne, Wyoming. In order to resolve the conflict between the two applicants, petitioners propose the allotment of Channel 260A at Cheyenne and that the Commission allow Rule to amend its application for the new channel without loss of cut-off protection, citing *Lander, Wyoming*, 46 Fed. Reg. 39605 (August 4, 1981); and *Albion, Nebraska*, 9 FCC Rcd 1374 (1994). To accommodate the allotment, petitioners assert that the deletion of vacant and unapplied for Channel 260C at Saratoga, Wyoming, is consistent with Commission policy that a vacant allotment may be deleted to accommodate a proposed new allotment where no interest has been expressed for the channel, citing *Northport, Alabama and Macon, Mississippi*, 8 FCC Rcd 2161 (1993); and *Oakdale and Campti, Louisiana*, 7 FCC Rcd 7600 (1992). Alternatively, petitioners state that if there is an expression of interest for Channel 260C at Saratoga, Channel 277C is available and can be substituted. Moreover, petitioners state that the public interest would be well-served by the early initiation of service to Cheyenne from both applicants. Petitioners also claim that grant of the proposal and the relief requested would enable the resolution of the mutually exclusive applications for Channel 285A at Cheyenne. Petitioners contend that Commission precedent generally favors settlements as a way of reducing the time, cost and uncertainty of protracted litigation, citing *RKO General, Inc.*, 3 FCC Rcd 5057 (1988).[2]

3. We believe petitioners' proposal warrants consideration because the allotment of Channel 260A at Cheyenne, Wyoming, could provide the community with its fifth local FM transmission service. In addition, the proposed allotment of Channel 260A at Cheyenne would accommodate both applicants' request for a Class A channel and avoid a comparative hearing for Channel 285A. An engineering analysis has determined that Channel 260A can be allotted to Cheyenne in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, provided Channel 260C is deleted at Saratoga.[3] Alternatively, to accommodate the Cheyenne allotment, Channel 277C can be allotted to Saratoga in compliance with the Commission's minimum distance separation requirements at petitioners' requested site with a site restriction of 9.3 kilometers (5.8 miles) northwest to avoid a short-spacing to Station KOAQ(FM), Channel 278C, Denver Colorado.[4] Since it appears that there is an additional equivalent class channel available for other expresssions of interest in Cheyenne (see n.1, *supra*), we propose to allow Rule Communications to amend its application to specify Channel 260A at Cheyenne, retaining its cut-off protection.

4. We shall also seek comments as to whether we should delete Channel 260C at Saratoga, Wyoming, to accommodate the allotment of Channel 260A at Cheyenne, Wyoming. Channel 260C was allotted to Saratoga in MM Docket 20577. *See* 37 RR 2d 813 (1976). A filing window was opened on December 13, 1985 and closed on January 13, 1986. The channel is currently vacant with no applications on file. If an expression of interest is filed during the comment period in this proceeding, we would allot Channel 277C at Saratoga and open a filing window for the new

[1] In the event there is an additional expression of interest for a Class A channel at Cheyenne, petitioners propose the allotment of Channel 280A. To accommodate the allotment, petitioners also propose the substitution of Channel 267C for the allotment site for Channel 280C, and the substitution of Channel 267C1 for the application site for Channel 280C1 at Gering, Nebraska. An engineering analysis has determined that the proposed coordinates for the substitution of Channels 267C and 267C1 at Gering are short-spaced to the vacant allotment for Channel 267C, Bridgeport, Nebraska. However, the study also revealed that Channel 240C can be substituted for Channel 267C at Bridgeport at reference coordinates 41-48-45 and 102-52-12, with a site restriction of 24.9 kilometers (15.5 miles) northeast that would be fully-spaced to both sites.

[2] At the present time, there is no basis upon which to designate these applications for a comparative hearing or to otherwise resolve these mutually exclusive applications. *See Bechtel v. Federal Communications Commission*, 10 F.3d 875 (D.C. Cir. 1993).

[3] The coordinates for Channel 260A at Cheyenne are North Latitude 41-08-18 and West Longitude 104-48-48.

[4] The coordinates for Channel 277C at Saratoga are North Latitude 41-30-12 and West Longitude 106-53-50.

channel. It is Commission policy not to delete a channel where there has been an expression of interest. However, if no interest is expressed for a channel at Saratoga, we will delete Channel 260C and no substitute allotment will be made to the community.

5. Accordingly, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

OPTION I

	Channel No.	
City	Present	Proposed
Cheyenne, Wyoming	250C, 264C1, 285A, 292C3	250C, 260A, 264C1, 285A, 292C3
Saratoga, Wyoming	260C	–

OPTION II

Cheyenne, Wyoming	250C, 264C1, 285A, 292C3	250C, 260A, 264C1 285A, 292C3
Saratoga, Wyoming	260C	277C

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 14, 1995**, and reply comments on or before **August 29, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the following:

John F. Garziglia, Esq. Pepper & Corazzini, L.L.P. 1776 K Street, N.W., Suite 200 Washington, D.C. 20006 (Counsel for Rule Communications)	Tom Bauman, President KRAE, Inc. 2109 East Tenth Street Cheyenne, Wyoming 82003 (Petitioner for KRAE, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-99

In the Matter of

Amendment of Section 73.202(b), RM-8612
Table of Allotments,
FM Broadcast Stations.
(Buffalo Gap, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 15, 1995; Released: June 23, 1995

Comment Date: August 14, 1995
Reply Comment Date: August 29, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by D. J. Broadcasting, Inc. ("D.J. Broadcasting"), licensee of Station WKDE-FM, Channel 288A, Altavista, Virginia, and Ridle Radio, Inc. ("Ridle Radio"), licensee of Station WSKO(FM),[1] Channel 288A, Buffalo Gap, Virginia ("petitioners"), requesting the substitution of Channel 238A for Channel 288A at Buffalo Gap, Virginia, and modification of Station WSKO(FM)'s license to specify operation Channel 288A. D.J. Broadcasting states it will reimburse Ridle Radio for the reasonable costs associated with the change in channel at Buffalo Gap, Virginia and Ridle Radio will file an application to modify its facilities if Channel 238A is allotted.

2. In support of their proposal, petitioners advise that both stations are presently precluded from operation with six kilowatts power on their present channels. Petitioners state that the channel substitution would benefit the public interest by enabling both stations to increase power to six kilowatts and will remove multiple short spacing conflicts.

3. We believe the public interest would be served by proposing the substitution of Channel 238A for Channel 288A at Buffalo Gap, since it could provide both communities with an improved FM service. Channel 238A can be allotted to Buffalo Gap, Virginia, in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station WSKO(FM)'s authorization.[2] In addition, this proposal is contingent upon Station WBOP(FM), Churchville, Virginia, receiving a license to operate on Channel 292B1 at the site specified in its construction permit.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Buffalo Gap, Virginia	288A	238A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested, to: Peter Wayne Lechman, 1790-10 East Market Street, Harrisonburg, Virginia 22801 [permittee of Station WBOP(FM)].

7. Interested parties may file comments on or before **August 14, 1995**, and reply comments on or before **August 29, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

York David Anthony
Lambert & Anthony, Consulting Engineers
2613 Craig Avenue
Concord, North Carolina 28027-4107
(Consulting Engineer for Petitioners)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of

[1] Ridle Radio is now the licensee of Station WSKO(FM), pursuant to the Commission's grant of an application for assignment of license from Tschudy Communications Corporation to Ridle Radio, on December 28, 1994, and which was consummated on February 22, 1995.

[2] The coordinates for Channel 238A at Buffalo Gap are North Latitude 38-10-55 and West Longitude 79-13-34.

[3] The coordinates for Channel 292B1 at Churchville, Virginia, as specified in Station KBOP(FM)'s construction permit are North Latitude 38-12-08 and West Longitude 79-04-34.

evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-137

In the Matter of

Amendment of Section 73.202(b) RM-8532
Table of Allotments,
FM Broadcast Stations.
(Romney, West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 15, 1995; Released: June 23, 1995

By the Chief, Allocations Branch:

1. At the request of The West Virginia Schools for the Deaf and the Blind ("petitioner"), licensee of Station WJGF(FM), Channel 201A, Romney, West Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 7173 (1994), proposing the substitution of Channel *281A for Channel 201A at Romney. Petitioner also requests that Channel *281A be reserved for noncommercial educational use, and that Station WJGF(FM)'s license be modified accordingly. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted.[1] No other comments were received.

2. In support of its proposal, petitioner states that the substitution of Channel *281A for Channel 201A at Romney will eliminate interference with Station WJAC-TV, Channel 6, Johnstown, Pennsylvania. Petitioner also states that there are no others channels available on the noncommercial educational band that would resolve the interference problem with Station WJAC-TV.

3. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican), or potential interference to operation on VHF Television Channel 6. Here, according to petitioner, there are no other noncommercial educational channels available for use at Romney, and potential interference to Station WJAC-TV, Channel 6, Johnstown, Pennsylvania, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use.

4. In reviewing this proceeding, we discovered that we erroneously proposed reservation of a channel at Romney. Because the proposal does not meet the criteria established to reserve a channel in the commercial band, the *Notice* should only have proposed the allotment of Channel 281A at Romney. Petitioner claims that there are no channels available in the noncommercial band that would not cause objectionable interference with Station WJAC-TV, Channel 6, Johnstown, Pennsylvania. An engineering analysis has determined that the Grade B contour of Station WJAC-TV is 103.97 kilometers (64.6 miles), and Romney is located 115.8 kilometers (72 miles) south of the station's transmitter site. Using center city reference coordinates at Romney, reserved Channels 213A -220A are not precluded by potential interference with Station WJAC-TV. However, because of proximity to other domestic noncommercial educational stations, none of the potential channels would meet the spacing requirements consistent with Section 73.207 of the Commission's Rules.

5. We note that Channel 281A could have been allotted to Romney as a commercial allotment and made available for application by petitioner and all other parties. Because there are no expressions of interest for Channel 281A as a commercial allotment by petitioner or any other party, and petitioner's proposal does not meet the criteria for reservation of the channel for noncommercial educational use, we will not allot the channel at Romney. Accordingly, we deny the petitioner's request for the substitution of Channel *281A for Channel 201A at Romney and its reservation for noncommercial educational use.

6. IT IS ORDERED, That the petition filed by The West Virginia Schools for the Deaf and the Blind, proposing the substitution of Channel *281A for Channel 201A at Romney and its reservation for noncommercial use, IS DENIED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As indicated in the *Notice*, petitioner's request, although signed and an addressed provided, did not verify the statements contained in the petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in his responsive comments, and has complied accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: June 23, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Ponce-Nicasio Broadcasting
Licensee, KCMY(TV)
1029 K Street
Suite 23
Sacramento, CA 95814

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of twenty thousand dollars ($20,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On July 30, 1993, you filed an application for renewal of license (FCC Form 303-S) for Station KCMY(TV), Sacramento, CA (File No. BRCT-930730KK). In a supplement to FCC Form 303-S you indicated that during the previous license term KCMY(TV) had failed to comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commissions Rules. In Exhibit 2 to your application you revealed that from January 26, 1992, to July 26, 1992, KCMY(TV) exceeded the commercial limits on children's programming on 27 occasions. All 27 instances were program-length commercials involving a program entitled "Quigley's Village". You state that KCMY(TV) did not add any commercial matter to "Quigley's Village", but did broadcast "some of the commercial messages included by the barter distributor." You further stated that KCMY substituted public service announcements and station identification announcements for the barter distributor's commercial messages where "program characters promoted the purchase of Quigley's Village memberships", but initially did not delete other commercial messages which promoted "Quigley's Village" products because of the station's belief that it "was not required where program characters were not involved in promoting" the sale or purchase of program-related products. You characterize this as "a single, recurring error... in 27 episodes of 'Quigley's Village....'" You further state that, upon learning in July, 1992, that a question had been raised concerning the "Quigley's Village" membership messages, KCMY(TV) modified its policy and deleted all such announcements. Finally, you state that your error in broadcasting these program-length commercials was unintentional, and that KCMY(TV) has instituted procedures to prevent any recurrence.

During the license term in question, after the children's programming commercial limitations became effective, you exceeded those limitations on 27 occasions, all program-length commercials. This record constitutes a repeated violation of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Ponce-Nicasio Broadcasting is hereby advised of its apparent liability for forfeiture in the amount of twenty thousand dollars ($20,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993).[1]

The 27 occasions on which KCMY(TV) exceeded the hourly limits on commercial matter during children's programming is a high number of violations. Moreover, all 27

[1] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993) ("*Policy Statement/Assessing Forfeitures*"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*,

occurrences were program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18.

Further, your assertion that KCMY(TV) deleted the barter distributor's commercial messages where program characters promoted "Quigley's Village" products, but did not delete the other commercial messages which promoted "Quigley's Village" products because of the station's belief that it "was not required where program characters were not involved", does not excuse or mitigate the violation. The Commission's policy on "*host-selling*" does, in fact, prohibit the use of children's program characters to promote products or deliver commercial messages during the program in which the character(s) appear. *Action for Children's Television*, 50 FCC 2d 1, 8, 16-17 (1974). However, although related, the Commission's host-selling policy is separate from and in addition to the Commission's policy with regard to program-length commercials directed at children. *Children's Television Programming, supra* 6 FCC Rcd at 2118, 2127 n.147. In *Children's Television Programming, id.* at 2117-18, the Commission specifically and unequivocally defined a program-length commercial as "a program associated with a product in which commercials for that product are aired". As the Commissionp stated in that Report and Order, this definition "is clear, easy to understand and apply, and narrowly tailored." *Id.* at 2118. Further, the distinction between program length commercials and host selling is clear and simple: program length commercials involve commercials for program-related *products* during the related program; host selling involves program-related *characters* promoting any product during the character(s)' program. In the absence of extraordinary difficulties or circumstances, a licensee's assertion that it did not understand the Commission's children's television policies does not relieve that licensee of liability for forfeiture for violation of those policies. *WKBD, Inc.*, 8 FCC Rcd 5079 (1993); *Channel 12 of Beaumont, Inc. (KBMT-TV)*, 9 FCC Rcd 1825 (1994).

Further, although KCMY(TV) appears to have made some effort to comply with the Commission's children's television rules and policies, that effort clearly was not sufficient or effective in light of the violations described in this letter. Finally, the fact that now you may have implemented a plan to prevent future violations of the Commission's children's television rules and policies does not relieve you of liability for prior violations. *International Broadcasting Corp.*, 19 FCC 2d 1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $20,000.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe that these violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station KCMY(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Ponce-Nicasio Broadcasting, File No. BRCT-930730KK, for Station KCMY(TV), Sacramento, CA, IS HEREBY GRANTED for a term to end on DECEMBER 1, 1998.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure

cc: William H. Fitz, Esq.
Robert L. Pettit, Esq.

they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (adopted March 10, 1995, released April 5, 1995, FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (adopted March 10, 1995, released April 5, 1995, FCC 95-109)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-540

In the Matter of

Amendment of Section 73.202(b) RM-6546
Table of Allotments,
FM Broadcast Stations.
(Rapid City, South Dakota)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 8, 1995; Released: June 23, 1995

By the Commission:

1. The Commission has before it an Application for Review filed by Spitzer Communications, Inc. ("Spitzer") on August 23, 1991. An opposition was filed September 9, 1991 by Tom-Tom Communications, Inc. Spitzer seeks Commission review of the July 9, 1991, *Memorandum Opinion and Order*, 6 FCC Rcd 4471 (1991) (*"MO&O"*), wherein the Commission reaffirmed the allotment of Channel 254C1 as an additional Class C1 channel to Rapid City and downgraded Channel 282C by substituting it with Channel 281C1. We agree with the Bureau's resolution of this case, and we affirm the Bureau's action denying Spitzer's petition for reconsideration and affirming the Bureau's action in *Report and Order*, 5 FCC Rcd 1033 (1990).[1]

2. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. §1.115(g), the Application for Review filed August 23, 1991 by Spitzer Communications, Inc. IS DENIED.

3. IT IS FURTHER ORDERED, That the Petition for Stay filed August 23, 1991 filed by Spitzer Communications IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Spitzer also filed a petition to stay the *MO&O* in this proceeding. However, in light of our action herein the petition for stay will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 23, 1995

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC record.

The decisions are placed in general docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Ariel Broadcasting, Inc. - Request for refund of a filing fee submitted in connection with an application for an FM station at St. Augustine Beach, Florida - **Granted** (June 6, 1995). [See 47 C.F.R. Section 1.1111(b)(2).]

AT&T Corp. - Request for refund of a hearing fee in connection with the proceeding of Elehue K. Freeman, et al. v. AT&T Corp. - **Granted** (May 18, 1995). [See 47 C.F.R. Section 1.1112(b).]

Baja Florida Radio, Inc. - Request for refund of a hearing fee for a new AM station at Kendall, Florida - **Granted** (May 18, 1995). [See 47 C.F.R. Section 1.1112(b).]

Big Tree Communications - Request for refund of a filing fee submitted in connection with an application for a new FM station at Merrill, Oregon - **Granted** (May 11, 1995). [See 47 C.F.R. Section 1.1112(a)(6).]

Charter Broadcast Group - Request for refund of filing fees submitted in connection with an application for a station at Loudonville, Ohio - **Granted** (May 12, 1995). [See 47 C.F.R. Section 1.1112(a).]

Conway, Lars T. dba Conway Broadcasting - Request for refund of filing fees submitted in connection with petitions to amend the FM table of allotments for the Billings, Montana; Sioux Falls, South Dakota markets - **Granted** (May 10, 1995). [See 47 C.F.R. Section 1.1112(a)(1).]

Great Lakes of Iowa, Inc. - Request for refund of a filing fee submitted in connection with a formal complaint - **Granted** (June 14, 1995). [See 47 C.F.R. Section 1.1108(d).]

Heritage Media Corporation - Request for refund of a filing fee submitted in connection with an application for an FM station at Liberty, Missouri - **Denied** (May 18, 1995). [See 47 C.F.R. Section 1.1112.]

Holston Valley Broadcasting Corporation - Request for refund of a filing fee submitted in connection with an application for an FM station at Kingsport, Tennessee - **Granted** (May 12, 1995). [See 47 C.F.R. Section 1.1112(a)(2).]

JEM Broadcasting Company, Inc. - Request for refund of hearing fee for a new FM station at Bentonville, Arkansas - **Granted** (May 18, 1995). [See 47 C.F.R. Section 1.1112(b).]

KFTY Broadcasting, Inc. - Request for reduction of Fiscal Year 1994 regulatory fee for Channel 50 at Santa Rosa, California - **Granted** (May 2, 1995). [See 47 C.F.R. Section 1.1165(d).]

Maranatha Broadcasting Company, Inc. - Request for reduction of Fiscal Year 1994 regulatory fees for a UHF station at Allentown, Pennsylvania - **Granted** (June 6, 1995). [See 47 C.F.R. Section 1.1165(d).]

Medinet, Inc. - Request for refund of filing fees submitted in connection with an application for equipment authorization - **Granted** (May 11, 1995). [See 47 C.F.R. Section 1.1108(d).]

Navajo Nation - Petition for Declaratory Ruling and request for refund of regulatory fees - **Granted** (May 26, 1995). [See 47 C.F.R. Section 1.1159(a)(1).]

Paugus Television, Inc. - Request for reduction of Fiscal Year 1994 regulatory fees for a TV station at Merrimack, New Hampshire - **Rescinded** (June 7, 1995). [See 47 C.F.R. Section 1.1165(d).]

RAM Mobile Data USA LP - Petition for reconsideration of a request for waiver of fees filed in conjunction with an application for waiver of rules - **Granted** (June 12, 1995). [See 47 C.F.R. Section 1.1112.]

Robinson, Todd P. - Request for refund of a hearing fee for a new FM station at Harrisburg, North Carolina - **Granted** (May 18, 1995). [See 47 C.F.R. Section 1.1111(b)(4).]

RR Donnelley & Sons Company - Request for waiver and refund of (Fiscal Year 1994 regulatory fees - **Granted** (May 26, 1995). [See 47 C.F.R. Section 1.1165(d).]

Tutera, Carl Como - Request for refund of a hearing fee for a new FM station at St. Augustine Beach, Florida - **Granted** (May 18, 1995). [See 47 C.F.R. Section 1.1111(b)(2).]

Visitor Information Radio of Florida, Inc. - Request for refund of a hearing fee for a FM station at St. Augustine Beach, Florida - **Granted** (May 18, 1995). [See 47 C.F.R. Section 1.1111(b)(2).]

WHOT, Inc. - Request for refund of filing fees submitted in connection with an application for a new broadcast station at Youngstown, Ohio - **Granted** (May 12, 1995). [See 47 C.F.R. Section 1.1112(a).]

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 418-1995.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 5 1995

J. Geoffrey Bentley, Esq.
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Re: Ariel Broadcasting, Inc.
New FM Station
St. Augustine Beach, Florida

Dear Mr. Bentley:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

__X__ In the case of a broadcast applicant, the individual application was dismissed pursuant to a

global settlement prior to designation for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 18 1995

Peter H. Jacoby, Esquire
Senior Attorney
AT&T Corp.
Room 3245F3
295 North Maple Avenue
Basking Ridge, NJ 07920

Re: AT&T Corp.
Elehue K. Freeman, et al.
v. AT&T Corp.
Request for hearing fee refund
Fee Control No. 9409028125001001

Dear Mr. Jacoby:

This is in response to your request for refund of a hearing fee, initially filed by AT&T Corp. (AT&T) on December 19, 1994 and supplemented on April 4, 1995, in connection with AT&T's participation, as respondent, in the above-captioned proceeding.

You state that, at the time AT&T filed its hearing fee, it was unaware that a respondent, in a complaint proceeding designated for hearing, is not required to remit a hearing fee.

In establishing its rules governing filing fees, the Commission determined that no fee should apply to enforcement actions because "the imposition of a fee would require a party to pay a fee to defend itself." See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Act of 1985, 2 FCC Rcd 947, 966 (1987), recon. denied, 3 FCC Rcd 5987 (1988). Therefore, a refund is warranted.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $7,765.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 [illegible] 1995

Joseph A. Belisle, Esquire
Leibowitz & Associates
Suite 1450
Sunbank International Center
One Southeast Third Avenue
Miami, Florida 33131-1715

Re: Baja Florida Radio, Inc.
For a new AM station at Kendall, Florida
Request for a hearing fee refund
Fee Control No. 9107188170295001

Dear Mr. Belisle:

This is in reference to your request for refund of the hearing fee submitted by Baja Florida Radio, Inc. (Baja), applicant for a new AM Station at Kendall, Florida.

You state that Baja was required to submit a hearing fee because its application for the station at Kendall was mutually exclusive with an application for changes in facilities filed by WYFX, Boynton Beach, Florida. Subsequently, as a result of an amendment by Baja to its application, the Mass Media Bureau determined that the application was no longer mutually exclusive with WYFX and began processing the application. See letter from Joseph B. Szczesny, AM Branch, dated January 17, 1995.

In view of the Mass Media Bureau determination that Baja's application is no longer mutually exclusive, it appears that Baja's application will no longer be designated for hearing. Therefore, we find that a grant of your request for refund is warranted.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 1 1995

Dennis M. Crepps
17544 Lakeshore Drive
Lake Shastina/Weed, California 96094

Re: Big Tree Communications
New FM Station
Merrill, Oregon
Fee Control # 9404298195741002

Dear Mr. Crepps:

This responds to your request for refund of a filing fee submitted on behalf of Big Tree Communications ("Big Tree"), with its construction permit application for a new FM station at Merrill, Oregon.

You state that Big Tree filed its original application on April 19, 1994, subsequent to the Commission's issuance of the Public Notice, "FCC Freezes Comparative Proceedings" ("Freeze Public Notice"), 9 FCC Rcd 1055 (1994). The Commission's Freeze Public Notice stayed comparative broadcast proceedings following the decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which invalidated the Commission's integration policy. The Freeze Public Notice established that during the stay, cut-off lists and window filings for new FM filings would not be issued.

Under the circumstances, since Big Tree's filing fee was submitted after the release of the Freeze Public Notice, and thus outside any applicable FM window, refund of the filing fee is appropriate. See 47 C.F.R. Section 1.1112(a)(6). Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 12 1995

Donald E. Martin, President
Charter Broadcast Group, Ltd.
6060 Hardwick Place
Falls Church, Virginia 22041

Re: Fee Control # 9411188350269005

Dear Mr. Martin:

This will respond to your request for refund of the filing fee submitted on behalf of Charter Broadcast Group ("Charter"), in connection with its assignment application.

You state, and your documentation shows, that the Audio Services Division dismissed Charter's application as unacceptable for filing, because Charter had utilized an obsolete FCC Form. Under the circumstances, since the Audio Services Division never processed Charter's assignment application, refund of the filing fee is appropriate. See 47 C.F.R. §1.1112(a). Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $95.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 0 1995

Mr. Lars T. Conway
President
Conway Broadcasting
4415 Fremont Ave. S.
Minneapolis, MN 55409

Dear Mr. Conway:

This is in reference to your request for refund of the fees you submitted in September, 1994 in connection with your petitions to amend the FM table of allotments for the Billings, Montana, Sioux Falls, South Dakota, and Rapid City, South Dakota markets. You indicated that after filing the petitions, you contacted a member of the FCC staff and were told that no fee was required for the petitions. You therefore maintain that you are entitled to a refund of $5400.

We have verified the receipt of three fee submissions from Conway Broadcasting, in the amount of $1800 each, associated with your petitions to amend the FM table of allotments.

The Commission's rules do not require a fee for filing a petition to amend the table of allotments for the filing of applications for new stations. Section 1.1104(2)(k) of the Commission's rules does provide that permittees or licensees filing a petition for rulemaking to change to a new community of license or a higher class channel must pay a fee of $1800. However, that provision applies only to permittees or licensees seeking to change their current authorizations. Because your petitions were to amend the table of allotments to allow for the filing of applications for new stations for those communities, this provision would not apply. Therefore, refund of your three filing fees is warranted.

Based on the foregoing, your request for the refund of the three fees is granted. A check, made payable to the maker of the original check and drawn in the amount of $5400, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 14 1995

Robert A. Harris, II, Esq.
Allen & Harold
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036

Re: Fee Control # 9411178120024001

Dear Mr. Harris:

This will respond to your request for refund of the filing fee submitted on behalf of Great Lakes of Iowa, Inc. ("Great Lakes"), in connection with its formal complaint.

You state that the Great Lakes had inadvertently submitted a $120 fee, which was less than that specified under the fee schedule, as set forth in 47 C.F.R. Section 1.1105(1)(c). You further state that Great Lakes subsequently had resubmitted its application and tendered the correct fee to cover the complaint filing. Under the circumstances, refund of the original filing fee is appropriate. See 47 C.F.R. Section 1.1108(d).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $120.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 0 1995

Michael S. Ray, Esq.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036

Dear Mr. Ray:

This will respond to your request for refund of a filing fee paid on behalf of Heritage Media Corporation ("Heritage") in connection with Heritage's request to change the call sign of its FM station. You state that Heritage is seeking the refund because it has withdrawn its request for the call sign change.

Unfortunately, your request for refund may not be granted. The Commission's rules do not provide for the refund of a filing fee upon the withdrawal of an application. See 47 C.F.R. Section 1.1112. Moreover, the Commission has explicitly stated that a refund would not be granted once an application has cleared the fee review process, irrespective of the disposition of the application. See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 949 (1987), recon. denied, 3 FCC Rcd 5987 (1988). Where applications have been withdrawn, requests for refunds have been denied. See, e.g., Public Notice, 9 FCC Rcd 356, 363 (M.D. 1993); Public Notice, 8 FCC Rcd 8258, 8263 (M.D. 1993).

Based on the foregoing, your request for refund is denied. If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 2 1995

Dennis J. Kelly, Esq.
Cordon and Kelly
P.O. Box 6648
Annapolis, Maryland 21401

Re: Fee # 950208195318002

Dear Mr. Kelly:

This will respond to your request for refund of a fee submitted on behalf of Holston Valley Broadcasting Corporation ("Holston"), permittee of FM station WTFM, Kingsport, Tennessee, in connection with its filing of an application to cover its construction permit for facilities that included a directional antenna system.

You state that the Audio Services Division had determined that Holston's application would be dismissed because Holston's filing fee was insufficient, and had advised Holston accordingly. You further state that Holston subsequently resubmitted its application and included the proper fee. Thus, you are requesting that the Commission refund Holston's initial fee payment. Under the circumstances, a refund is appropriate. See 47 C.F.R. Section 1.1112(a)(2).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $410.00 will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 3 1995

Mr. Elvis Moody
President
JEM Broadcasting Company, Inc.
216 North Main Street
Bentonville, Arkansas 72712

JEM Broadcasting Company, Inc.
Request for refund of hearing fee
Control No. 9403118170062001

Dear Mr. Moody:

This is in response to your request for refund of the hearing fee that JEM Broadcasting Company, Inc. (JEM) filed in connection with its application for a radio station at Bentonville, Arkansas.

You state that JEM is within the category of mutually exclusive applicants that were directed to file hearing fees, but whose applications were held in abeyance pending the Commission's consideration of appropriate action following the court's remand in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). See FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994). Subsequently, the Commission announced by Public Notice that any party that submitted a hearing fee after February 25, 1994 is entitled to a refund of its hearing fee. See Public Notice, No. 94-204, issued August 4, 1994. JEM's check, covering its hearing fee payment, was deposited into the Commission's account on March 11, 1994.

Under the circumstances, since JEM's hearing fee was submitted after February 25, 1994, refund of its fee is appropriate. Accordingly, your request is granted.

A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 2 1995

Roger J. Metzler, Esq.
Keck, Mahin & Cate
One Maritime Plaza
San Francisco, CA 94111-3577

Re: Fee Control # 9408018835092008
9409098835447005
Fee Paid: $14,400
KFTY Broadcasting, Inc.
Channel 50
Santa Rosa, California

Dear Mr. Metzler:

This is in response to your request for reduction of the Fiscal Year 1994 regulatory fee assessed upon KFTY Broadcasting, Inc., licensee of UHF Station KFTY, Santa Rosa, California.

You maintain that, although KFTY Broadcasting is assigned by Arbitron to the San Francisco-Oakland-San Jose California ADI (Area of Dominant Influence), it does not serve any of the major cities in that market, and its signal is not entitled to "Must Carry" protection on any of the cable systems serving San Francisco, Oakland, or San Jose. You state that KFTY has an audience of about 246,000 households, which would place it in the top 50 to 100 markets. Therefore, you contend that it would be inequitable to require KFTY Broadcasting to pay the regulatory fee assessed for a station in the San Francisco-Oakland-San Jose market, which ranked in the top ten markets. You submitted payments totaling $14,400 for the fee for a San Francisco station.

Our review of the record discloses that KFTY is included in the San Francisco, Television Market, the 5th largest television market. KFTY, however, does not serve San Francisco, Oakland or San Jose, or any significant population areas in those metropolitan regions, nor does its Grade B contour cover any part of those cities. Rather, KFTY is considered to be in the San Francisco ADI because it serves an area where the preponderance of TV households view the programming of San Francisco stations. Arbitron states that there are 438,200 TV households covered by KFTY's signal. Television & Cable Factbook 1994, p. A181. Thus, we agree that KFTY should not be considered a station serving the fifth largest market for purposes of assessment of the regulatory fee. Therefore, we will assess KFTY's fee based on the number of TV households served. Since the 438,200 TV households covered would place KFTY in the 51-100 TV markets, we will require KFTY Broadcasting to pay a fee of $6,400 for Fiscal Year 1994, the fee assessed for UHF television stations serving the 51-100 markets.

Accordingly, your request is granted and the fee will be reduced. Crediting the $14,400 payment that KFTY Broadcasting tendered for Fiscal Year 1994 regulatory fee, we will refund the $8000 overpayment to KFTY Broadcasting. Absent significant changes in population or KFTY's service area, KFTY will be considered as a market 51-100 UHF station in succeeding years. KFTY Broadcasting should retain this letter and submit a copy with any future correspondence with the Commission concerning the regulatory fee for KFTY.

A check payable to the maker of the original check in the amount of $8000 will be sent to you at the earliest practicable time. If you have any questions concerning the fee or refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 6 1995

Mr. J. Geoffrey Bentley, Esquire
Birch, Horton, Bittner and Cherot
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Maranatha Broadcasting
WFMZ-TV
Allentown, Pennsylvania
Fee Control #9409078835442006

Dear Mr. Bentley:

This is in response to your request dated August 1, 1994, for reduction of the annual regulatory fee for UHF Station WFMZ-TV, Allentown, Pennsylvania, licensed to Maranatha Broadcasting Company, Inc.

You argue that although WFMZ-TV is assigned by Arbitron to the Philadelphia, Pennsylvania ADI (Area of Dominant Influence) Market, it does not operate as a Philadelphia Station, it is treated as a separate smaller market under the Commission's cable television rules (47 C.F.R. §§ 76.53 and 76.59), and that it would be inequitable to require it to pay the regulatory fee for a Philadelphia Station. Therefore, you argue that the Commission should regard WFMZ-TV as a non-top 100 or "remaining market" station subject to a regulatory fee of $4,000. Maranatha Broadcasting Company, Inc. submitted payment of $6,400 and it requests a refund of $2,400. For FY 1994, the regulatory fee payment due for a UHF station in the Philadelphia market is $14,400.

Our review of the record shows that WFMZ-TV is in the Philadelphia, Pennsylvania Market, the 4th largest market. WFMZ-TV, however, does not serve Philadelphia or any significant population in the Philadelphia area. The Broadcasting & Cable Yearbook 1994, p. c-202 lists Allentown as a Non-ADI market. A Non-ADI market is defined as a single-county market whose "preponderance of viewing is not to the home market station." The home county in this case, Lehigh County, is assigned to the Philadelphia ADI solely because the preponderance of viewing in the county is of the Philadelphia stations. Thus, we agree that WFMZ-TV should not be considered a Philadelphia market station for purposes of assessing the regulatory fee.

Arbitron shows that there are 467,300 TV households in WFMZ-TV's service area with little or no significant penetration into the Philadelphia metropolitan area. The 467,300 TV households is the equivalent of a station in the 51-100 markets category. Under these circumstances, we will regard Allentown as a 51-100 market, and WFMZ-TV is assessed a regulatory fee for FY 1994 of $6,400, the fee for a 51-100 market UHF station. Absent significant changes in population or coverage area, WFMZ-TV will be considered as a 51-100 market station in succeeding years. A copy of this letter should be included with any future correspondence with the Commission with respect to the regulatory fee for station WFMZ-TV.

The payment previously submitted by Maranatha Broadcasting Company, Inc. satisfies its regulatory fee obligation for FY 1994. If you have any questions concerning the regulatory fee, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 11 1995

Mr. Cheng-Yang Ho, Manager
Spectrum Research & Testing Laboratory, Inc.
1603 Skinners Turn Road
Owings, Maryland 20736

Re: Fee Control # 9502038315053011

Dear Mr. Ho:

This will respond to your request for refund of the filing fees submitted on behalf of Medinet, Inc. ("Medinet") in connection with its application for equipment authorization. You state that Medinet's application was dismissed because it had specified an FCC Identifier that the Commission had previously issued. You further state that you have refiled Medinet's application, with a new FCC Identifier and an additional fee payment.

As part of the Commission's equipment authorization process, approved equipment must be identified with a unique FCC Identifier, which consists of the grantee code and the equipment number/product code. See 47 C.F.R. sections 2.925, 2.926. This identification requirement provides a systematic method by which Commission approved equipment can readily be identified. Applications for equipment authorizations often are dismissed, without any engineering review, due to a defective FCC Identifier. The Commission has recognized that it may be unfair to require the applicant/grantee to refile its application with an additional fee payment merely to correct such errors or deficiencies. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Act of 1985, 2 FCC Rcd 947, 964 (1987). In such cases, the Commission has indicated that under section 1.1108(d) of the Commission's rules, 47 C.F.R. section 1.1108(d), it may be appropriate for the applicant/grantee to refile its corrected application without paying an additional fee. Id. However, since Medinet did pay an additional fee with its resubmission, we believe a refund is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $845.00, will be sent to you at the earliest practicable time. If you have any further questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 2 6 1995

Ann K. Ford, Esquire
Fisher, Wayland, Cooper, Leader & Zaragoza
2001 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Re: Navajo Nation
KTNN(AM)
KWRK(FM)
Fee Control # 9408038835056011
9409078835461002

Dear Ms. Ford:

This is in response to the Petition for Declaratory Ruling filed September 2, 1994, requesting a refund of the $900 in regulatory fee payments tendered in the above referenced matter. In the petition you requested that the Commission exempt the Navajo Nation as a government entity from payment of the regulatory fees.

Congress exempted governmental entities from the regulatory fees. 47 U.S.C. § 159(h). In Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5339-40 § 14 (1994) we codified the exemption for governmental entities. See 47 C.F.R. § 1.1161(b). The Navajo Nation was established by treaty with the United States, with its own land, laws and government. As such, it falls within that exemption from the regulatory fees for governmental entities as established by Congress.

Thus, the Navajo Nation is entitled to a refund of its regulatory fee payment pursuant to 47 C.F.R. § 1.1159(a)(1), because no regulatory fee is required.

A check, made payable to the maker of the original checks in the amount of $900, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Tom Halleran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 2 6 1995

Mr. Lon Mirolli
President/General Manager
Paugus Television, Inc.
1 Sundial Avenue
Suite 501
Manchester, NH 03103

Re: Paugus Television, Inc.
WGOT-TV
Merrimack, NH
Fee Control # 9409078835442005
9502178835215001
Fee Paid: $14,400

Dear Mr. Mirolli:

This is in response to your request, for a reduction in the Fiscal Year 1994 regulatory fee assessment for Paugus Television, Inc. (Paugus), licensee of UHF Station WGOT-TV, Merrimack, New Hampshire.

You maintain that although Merrimack is assigned by Arbitron to the Boston, Massachusetts, ADI (Area of Dominant Influence), it does not serve the City of Boston. Therefore, you contend that it would be inequitable to require Paugus to pay the regulatory fee for a Boston station. Moreover, because WGOT-TV serves an area in New Hampshire, with a population of 371,880, you contend that Paugus should be assessed the regulatory fee applicable to a UHF station serving markets 51 through 100.

Our review of the record discloses that WGOT-TV is included in the Boston Television Market, the 6th largest television market. WGOT-TV, however, does not serve Boston or any significant population in the Boston metropolitan area. Rather, WGOT-TV is considered to be in the Boston ADI because it serves an area where the preponderance of TV households view the programming of Boston stations. Arbitron shows that there are 325,000 TV households, located in New Hampshire, covered by WGOT's signal, and little, if any, significant viewing of WGOT-TV's programming by viewers in the Boston metropolitan area. Thus, we agree that WGOT-TV should not be considered a Boston market station for purposes of assessment of the regulatory fee. Therefore, we will assess WGOT-TV's fee based on the number of TV households served. Since the 325,000 TV households covered would place WGOT-TV in the equivalent of the 51-100 TV markets, we will require Paugus to pay a fee of $6,400, the fee assessed for UHF television stations serving the 51-100 markets.

Accordingly your request is granted. Crediting the $14,400 fee payment previously tendered by Paugus for Fiscal Year 1994, we will refund the $8000 overpayment to Paugus. Absent significant changes in population or WGOT-TV's service area, WGOT-TV will be considered as a market 51-100 UHF station in succeeding years. Paugus should submit a copy of this letter with future correspondence with the Commission concerning the regulatory fee applicable for WGOT-TV.

A check made payable to the maker of the original check in the amount of $8000, will be sent to you at the earliest practicable time. If you have any questions concerning the fee or refund, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Tom Halloran for

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUN 1 2 1995

Jonathan L. Wiener, Esq.
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Re: Fee Control # 9309238300249005
Fee Paid: $105
Fee Control # 9405098300451015
Fee Paid: $168,630
RAM Mobile Data USA Limited Partnership

Dear Mr. Wiener:

This is in response to the Petition for Reconsideration that you filed on behalf of RAM Mobile Data USA Limited Partnership (RAM) requesting that the Commission waive the fees paid by RAM in conjunction with its requests for waivers of Section 90.603(c) of the Commission's Rules. 42 C.F.R. § 90.603(c).

RAM filed 1,823 applications for transfer of licenses in the Specialized Mobile Radio Services (SMRS) together with a single waiver fee of $105. Subsequently, RAM reduced the number of its SMRS applications and paid an additional 1,606 filing fees for the waiver request, amounting to $168,630. In a letter dated August 25, 1994, the Associate Managing Director denied RAM's waiver request for a refund of the Section 90.603(c) waiver filing fees, finding that RAM's waiver requests were "non-routine" and therefore, were each subject to a filing fee of $105. Subsequently, in Eligibility for the Specialized Mobile Radio Services, FCC 95-98, released March 7, 1995, the Commission removed the restrictions against wireline telephone carrier entry into the SMRS markets, and it dismissed RAM's waiver requests as moot.

Section 1.1112(a)(4) provides that the Commission will refund fees "(w)hen the Commission adopts new rules that nullify applications already accepted for filing. . . ." Here, RAM's requests for rule waivers were dismissed because of changes in the Commission's rules, and as a result, we are satisfied that RAM should receive a refund of the filing fees that it paid for the dismissed waiver applications.

Accordingly, your petition is granted. A check, made payable to the maker of the original check in the amount of $168,735, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 8 1995

Mr. A. Wray Fitch, III, Esq.
Gammon & Grange, P.C.
8280 Greensboro Drive
McLean, Virginia 22102

Re: Todd P. Robinson
New FM Station
Harrisburg, North Carolina
Fee Control # 9209298170386001

Dear Mr. Fitch:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for

hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the merged application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 2 6 1995

J. D. Thomas, Esquire
Cole, Raywid & Braverman
Second Floor
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-3458

Fee Control No. 9409158835547006
R. R. Donnelley and Sons Company
Request for regulatory fee refund
Warsaw, Indiana (E860673), Lancaster, Pennsylvania (E860674), Chicago, Illinois (E860693), Reno, Nevada (E881089), Spartanburg, South Carolina (E6666), and Gallatin, Tennessee (E6667)

Dear Mr. Thomas:

This is in response to your request for waiver and refund on behalf of R. R. Donnelley & Sons Company (Donnelley) of its Fiscal Year (FY) 1994 regulatory fee payments for the above-captioned earth stations.

You state that Donnelley totally ceased operation of the subject earth stations no later than December, 1992, nine months before the calculation date of the fees, as a result of technological changes and changes in its operational requirements. As a consequence, you contend that no fees are due from Donnelley because it did not operate the earth stations at any time during FY 1994. In fact, Donnelley has dismantled and sold its earth station equipment with the exception of its facility at Chicago. Finally, you state that Donnelley surrendered its licenses covering the earth stations concurrently with the filing of the instant waiver request.

In support of the foregoing, you have submitted a statement by John Robinson, Technical Director in the Communications Systems Section of Donnelley, the official responsible for the coordination and implementation of Commission authorizations and Donnelley's earth station facilities. Mr. Robinson states that he was unaware of Donnelley's regulatory fee obligation, but had he known of the requirement, he would have timely surrendered the authorizations so that Donnelley would not be subject to regulatory fee payments for facilities no longer in use.

In adopting its schedule of regulatory fees for FY 1994, the Commission stated that the fees should be submitted for authorizations, including earth stations licenses, held as of October 1, 1993, the first day of FY 1994. See Implementation of Section 9 of the Communications Act, 9 FCC Rcd 5333, 5349 (1994).

The Commission selected October 1, 1993 as the date for calculating most fees so that "current licensees subject to the fees would have benefitted from our regulatory activities since the beginning of the period covered by their payment." Id. Thus, the Commission contemplated that the payors of the fees would receive at least some period of regulatory benefit during the fiscal year covered by the fee requirement.

In the case of Donnelley, its earth stations were out of operation well in advance of the first day of the FY 1994 and, therefore, we cannot find that Donnelley received any regulatory benefit during any portion of the relevant fiscal year. Nor will Donnelley receive any future benefit from our regulation since it has both dismantled and sold its earth station facilities, except for its Chicago facility, and surrendered its earth station licenses, including its authority to operate its Chicago facility. Finally, we are cognizant of its Technical Director's representation that Donnelley would have timely surrendered the licenses for its non-operational earth stations had he been aware of the pendency of the regulatory fee requirement.

Under these circumstances, we find that, although Donnelley held the subject licenses on October 1, 1993, it is entitled to a waiver of its FY 1994 regulatory fees for the discontinued stations.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $4,083.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Tom Hallerman for
Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 6 1995

Neal J. Friedman, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

Re: Carl Como Tutera
New FM Station
St. Augustine Beach, Florida

Dear Mr. Friedman:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

__X__ In the case of a broadcast applicant, the individual application was dismissed pursuant to a global settlement prior to designation for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Federal Communications Commission
Washington, D.C. 20554

May 18, 1995

Gary S. Smithwick, Esquire
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Washington, D.C. 20036

Re: Visitor Information Radio of Florida, Inc.
For a FM station at St. Augustine Beach, Florida
Request for a hearing fee refund
Fee Control No. 9302258170421003

Dear Mr. Smithwick:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. § 1.111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

__X__ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 1 [illegible] 1995

Dennis F. Begley, Esq.
Reddy, Begley, Martin & McCormick
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037-1803

Re: Fee Control # 9409308190089010

Dear Mr. Begley:

This will respond to your request for refund of the filing fee submitted on behalf of WHOT, Inc. ("WHOT"), in connection with its application for an extension of time to construct its facilities for a new broadcast station at Youngstown, Ohio.

You state that on the date WHOT filed its extension application, the Commission modified its construction permit and extended its construction period by an additional 18 months. Thus, you state that WHOT's extension application was rendered moot.

Under the circumstances, since WHOT was not required to file the extension application, refund of the filing fee is warranted. See 47 C.F.R. §1.1112(a). Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $230.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
McElroy Electronics Corporation	)	
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 2B, Los Angeles, California	)	File No. 01758-CL-MP-88
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 15A, Minneapolis - St. Paul, Minnesota	)	File No. 02613-CL-MP-89
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 26A, Phoenix, Arizona	)	File No. 02639-CL-MP-89
	)	
Los Angeles SMSA Limited Partnership	)	
	)	
For Authorizations to Serve Unserved Areas in Metropolitan Statistical Area Market No. 2B, Los Angeles, California	)	File No. 02040-CL-MP-88 File No. 02168-CL-MP-89
	)	
JAJ Cellular	)	
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 2B, Los Angeles, California	)	File No. 02243-CL-MP-89
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 26A, Phoenix, Arizona	)	File No. 02905-CL-MP-89
	)	
Price Communications Cellular, Inc.	)	
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 2B, Los Angeles, California	)	File No. 02685-CL-MP-89
	)	
Metro Mobile CTS of Phoenix, Inc.	)	File No. 02521-CL-MP-89 File No. 04376-CL-MP-92
	)	
For Modification of License for Station KNKA 303 in the Domestic Public Cellular Radio Telecommunications Service in Market No. 26A, Phoenix, Arizona	)	
	)	

AB Fillin, *et al.*	)	Fee Nos. 9303128862051017, *et al.*
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 2B, Los Angeles, California (Filed March 10, 1993)	)	
AB Fillin, *et al.*	)	Fee Nos. 9303118862008020, *et al.*
	)	
For Authorization to Serve Unserved Areas in Metropolitan Statistical Area Market No. 15A, Minneapolis - St. Paul, Minnesota (Filed March 10, 1993)	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; **Released: March 23, 1995**

By the Commission:

I. INTRODUCTION

1. In McElroy Electronics Corporation v. FCC, 990 F.2d 1351 (D.C. Cir. 1993) (McElroy), the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded, in part, the First Report and Order and Memorandum Opinion and Order on Reconsideration (CC Docket Nos. 90-6 and 85-388), 6 FCC Rcd 6185 (1991) (First Report and Order). By that order, we affirmed an order of the Chief of the Common Carrier Bureau (Bureau) that dismissed the above-captioned applications of McElroy Electronics Corporation (McElroy), Los Angeles SMSA Limited Partnership (L.A. Partnership), JAJ Cellular (JAJ), and Price Communications Cellular, Inc. (Price) (collectively, the Appellants) to serve unserved areas in one or more of the metropolitan statistical areas (MSAs) of Minneapolis - St. Paul, Minnesota; Los Angeles, California; and Phoenix, Arizona. Cellular Applications for Unserved Areas, 4 FCC Rcd 3636 (CCB 1989) (April Order). The Court ordered the Commission to reinstate nunc pro tunc the applications of McElroy, L.A. Partnership, and JAJ; to determine if Price's application was timely filed; and to determine whether the Comission's current rules will apply to the reinstated applications.

2. This order responds to the Court's remand. This order also addresses a joint motion for full market settlement in the Los Angeles MSA filed by the Appellants, comments filed by CCC Data Corporation and Spectrum Resources Limited (Commenters), a petition for special relief filed by Metro Mobile CTS of Phoenix, Inc. (Metro Mobile), and petitions for reinstatement filed by Fort Mojave Telecommunications, Inc., S+S Partnership, Warren Communications, Leonard Communications, Inc., and G&S Communications, Inc. and Abington Cellular Partnership (collectively, Petitioners), as well as a petition for reinstatement filed by Price.

3. For the reasons set forth below, this order: reinstates nunc pro tunc Price's application; finds the reinstated applications and the applications properly filed during the

Commission's March 10, 1993 one day filing window (the March 10th applications) mutually exclusive; denies the petitions for reinstatement other than Price's; denies the motion for settlement; finds that Metro Mobile is entitled to a full five year term from the date it received its construction authorization to expand its cellular system in the Phoenix MSA; dismisses the Phoenix applications filed by McElroy and JAJ; and declines to apply to McElroy, JAJ, LA Partnership, and Price the method for determining a station's service area boundary (SAB) currently prescribed in the Commission's Rules.[1]

II. BACKGROUND

4. In April 1987, to encourage development of cellular telephone service, we ruled that each cellular licensee or permittee would have a five-year period to expand service within its MSA free from competing applications. See Second Report and Order in CC Docket No. 85-388, 2 FCC Rcd 2306 (1987) (Second Report and Order). The "fill-in" or expansion period for each licensee or permittee began on the date that we granted the first construction authorization in the MSA. After the five-year fill-in period had expired, competitors would be permitted to file applications to serve areas within the MSA that were not being served by the incumbents. Shortly after the expiration of the respective five-year fill-in periods in the Minneapolis - St. Paul, Los Angeles, and Phoenix MSAs, but before the Commission had announced any procedures for filing or processing unserved area applications, the captioned applications were filed with the Commission. In April 1989, the Bureau interpreted the Second Report and Order to mean that no applications for unserved areas would be accepted until procedures for accepting, processing, and granting applications and a date for accepting applications had been established. Accordingly, the Bureau dismissed and returned the applications as premature. See April Order, supra.

5. The Appellants filed petitions for reconsideration of the April Order, which we denied in the First Report and Order. In April 1993, the Court reversed our dismissal of the Appellants' applications and instructed us to reinstate McElroy's, L.A. Partnership's and JAJ's applications nunc pro tunc. The Court indicated that we had erred in dismissing these applications as prematurely filed. The Court further instructed us to reinstate Price's application if we determined that the application was timely filed. The Court also noted that in carrying out its mandate, the Commission would need to determine which, if any, of the subsequent rule modifications should be applied to the reinstated applications.[2]

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[1] See 47 C.F.R. § 22.903.

[2] Appellants then sought relief from the Court. After the applications were filed, we made several modifications to the rules governing processing of unserved area applications. First, we amended Section 22.31(a)(1)(i) of the Rules, 47 C.F.R. § 22.31(a)(1)(i), by establishing an independent five-year fill-in period for each frequency block granted in an MSA. See Order on Reconsideration of Second Report and Order, 4 FCC Rcd 5377 (1989). We also amended Section 22.903 of the Rules, 47 C.F.R. § 22.903, to redefine the method by which licensees' Cellular Geographic Service Areas (CGSAs) are determined. See Second Report and Order in CC Docket No. 90-6, 7 FCC Rcd 2449 (1992), aff'd, 8 FCC Rcd 1363 (1993), further recon. pending, petition for review pending sub nom. Committee for Effective Cellular Rules v. FCC, No. 93-1220 (D.C. Cir., filed Mar. 22, 1993). The Bureau subsequently announced that unserved area applications for the Minneapolis - St. Paul, Los Angeles, and Phoenix MSAs

6. Pursuant to the Court's instructions, we have reinstated the applications of McElroy, L.A. Partnership and JAJ nunc pro tunc as of the dates that they were originally filed.[3] This order determines the rights and obligations of all the parties: the reinstated applicants, Price, those who filed applications during the March 10, 1993 one-day filing window, Metro Mobile, and the parties whose applications were dismissed as premature, but who did not seek redress from the Court.

III. DISCUSSION

7. The following discussion analyzes the public notices that announced the filing of the Appellants' applications for purposes of determining at what point competing applications for the Los Angeles, Minneapolis - St. Paul, and Phoenix markets were no longer allowed to be filed. The discussion also explains which processing rules, namely those concerning the appropriate fill-in period and CGSA definition, apply to the parties in this proceeding and how these rules affect the parties in each of the three MSAs.

8. The initial issue to be determined in implementing the Court's instructions is whether the 1988 and 1989 public notices announcing that the Appellants had filed applications to provide cellular service in the three MSAs established a valid deadline or "cut-off" date for the filing of competing applications.[4] Our resolution of this issue establishes the relative rights of each of the parties, especially those of the reinstated Appellants, Price, and the March 10 applicants.

9. Section 22.31(b)(2)(i) of the Commission's Rules, 47 C.F.R. § 22.31(b)(2)(i), provides that applications filed within sixty days of the public notice listing the first application as accepted for filing will be given comparative consideration if they are mutually exclusive. Applications filed beyond this sixty day period are "cut-off" and not eligible for consideration. Conversely, public notices that merely inform the public that applications have been received confer no rights on an applicant or any other person. 47 C.F.R. § 22.27(a)(3) ("Such notices are solely for the purpose of informing the public and do not create any rights in an applicant or any other person.").

10. Neither the public notice announcing the applications of the three reinstated Appellants' nor the public notice announcing Price's application established a deadline for competing applications. The 1988 and 1989 public notices did not meet the standards articulated in our Rules for establishing a valid "cut-off" date because the public notices did not specify that the applications had been "accepted for filing," as required by both the Act and the Rules. See 7 U.S.C. § 309(b)(1) and 47 C.F.R. §§ 22.26(b). Thus, the public

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would only be accepted during a one-day "filing window" that would open and close on March 10, 1993. See Public Notice, Report No. CL-93-36 (December 23, 1992).

[3] The Bureau announced the reinstatement of the applications for the Los Angeles and Minneapolis-St. Paul MSAs in Public Notice, Report No. CL-94-14 (November 15, 1993). The applications for the Phoenix MSA were reinstated in Metro Mobile CTS, Inc., 8 FCC Rcd 8675 (1993).

[4] See Public Notice, Report No. CL-88-154 (August 29, 1988) and Public Notice, Report No. CL-89-80 (February 6, 1989).

notices did not establish cut-off dates.

11. In view of the foregoing, Price's application was not "cut-off" despite the fact that it was filed more than sixty days after the date of the public notice announcing the filing of the Los Angeles applications. Price's application is, therefore, entitled to reinstatement and consideration with the applications of McElroy, L.A. Partnership, and JAJ for the Los Angeles market. In fact, a "cut-off" date was not officially established until March 10, 1993, when the Bureau opened a one-day "filing window" for applications to provide cellular service to the unserved areas of the Minneapolis - St. Paul, Los Angeles, and Phoenix MSAs. Consequently, the applications of the Appellants and all the applications received on March 10, 1993[5] will be eligible for selection for unserved area licenses for these three markets.[6] Pursuant to our recent decision in PP Docket 93-253, we will use random selection to choose from among applicants for these licenses because we have determined this will bring service to the public more expeditiously than comparative hearings or competitive bidding. See Implementation of Section 309(j) of the Communications Act Competitive Bidding in PP Docket 93-253, FCC 94-123, released July 14, 1994.[7] Specifically, with respect to Appellants' argument that we should use comparative hearings, the Commission clearly had not decided what procedures would be used to resolve mutually exclusive applications for unserved cellular areas when the applicants filed and, by the time the applicants had filed, the Commission had already initiated a trend toward use of lotteries rather than comparative hearings for cellular radio applications.[8] Thus, Appellants have no equitable claim to comparative hearings.[9] Moreover, Appellants have provided no reasons that convince us that the same rationale that led us to choose lotteries over comparative hearings in other cellular radio contexts is not applicable here.[10]

12. Other parties whose applications were dismissed as prematurely filed before the one-day filing window will not be reinstated and will not be afforded contemporaneous

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[5] On that day the Commission received 517 applications for Los Angeles, 494 applications for Minneapolis - St. Paul, and one application for Phoenix.

[6] The Applicants have filed a motion for "full market" settlement in Los Angeles. The motion does not include the March 10th applicants for that market, however. Consequently, the motion shall be denied.

[7] We intend for the Wireless Telecommunications Bureau to issue a public notice identifying the applications accepted for filing in the Minneapolis - St. Paul, Los Angeles, Phoenix MSAs within 30 days of the release date of this order.

[8] See Cellular Lottery Notice (CC Docket No. 83-1096), 48 Fed. Reg. 51493, released October 28, 1983.

[9] Cf. Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987).

[10] Namely, a lottery, rather than a comparative hearing, will speed cellular licensing with no identifiable reduction in the quality of service to be provided to the public. See Cellular Lottery Order, 98 F.C.C. 2d 175 (1984).

consideration.[11] Those applicants failed to preserve their claims by seeking judicial review of the dismissal of their applications. Because these applicants elected not to avail themselves of the remedies provided by law, filing an application for review with the Commission and an appeal with the Court, they cannot now insist upon reinstatement with the Appellants who preserved their rights through appeal. See, e.g., Aeronautical Radio, Inc. v. FCC, 983 F.2d 275, 282 (D.C. Cir. 1993).

13. We also are mindful of the Court's instruction to treat similarly situated parties alike or provide adequate justification for disparate treatment. For example, the Court questioned what it viewed as the Commission's apparent inconsistent treatment of L.A. Partnership, as an incumbent licensee in the Los Angeles MSA, vis-a-vis Metro Mobile and US WEST New Vector, Inc. (US West), the Block A and Block B licensees in Phoenix. The Court noted that we dismissed L.A. Partnership's application to expand its CGSA within the MSA because it was filed after the fill-in period had expired, but retained and granted similar applications filed by Metro Mobile and US West in Phoenix. See McElroy at 1365-66.

14. Our actions in Phoenix were the products of administrative error. US West's application was one of numerous uncontested applications granted by the Bureau on February 2, 1988. Our review of the record, however, has since disclosed US West's application included an extremely limited, yet untimely, expansion of its CGSA, totaling less than one percent of US West's authorized service area. This expansion was overlooked when the Commission acted. See US West application file number 02242-CL-MP-89, filed October 28, 1988. Nonetheless, in view of the limited incursion into an unserved area, the long passage of time, and the apparent innocence of the mistake, we conclude that the public interest would not be served by rescinding the grant of US West's application at this late date. Metro Mobile's case, however, is entirely different. Its application (file number 02521-CL-MP-89) was, and is, formally opposed by McElroy. This fact was overlooked by the Commission when it mistakenly granted the application. Having subsequently discovered the pending petition to deny, we have since rescinded the illegal grant. See Metro Mobile CTS, Inc., supra.

15. Having determined the applicants that are entitled to contemporaneous consideration, we must now prescribe the processing rules that apply to the various reinstated applications. In doing so, we must consider, as the Court recognized, "the dilemma of whether to consider those [reinstated] applications under [our] current rules and conditions, which would, in some cases, disadvantage petitioners, or whether to attempt to restore the status quo, which could disturb the rights and expectations of those who benefited from the Commission's subsequent actions." McElroy, supra at 1365. In making this determination, the Court instructed us to apply the balancing test traditionally used in determining whether adjudicatory decisions should be given retroactive effect. Id.

16. We note that the Court referred to this as a retroactivity issue. Id. By this use of the word retroactivity, we understand the Court to be referring to the retroactive effects on applicants' expectations if the new rules are applied prospectively to their pending applications, i.e., an issue that Justice Scalia has discussed as "secondary retroactivity."

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[11] Those applications include those filed by Fort Mojave Telecommunications, Inc., S+S Partnership, Warren Communications, Leonard Communications, Inc., G&S Communications, Inc., and Abington Cellular Partnership.

Bowen v. Georgetown University Hospital, 488 U.S. 204, 219 (1988)(Scalia, J. concurring). The Court could not have been suggesting that the FCC would be engaging in retroactive rulemaking in response to the Court's remand since, as the Supreme Court made clear in Georgetown University Hospital, retroactive rulemaking is unlawful unless permitted by statute. 488 U.S. at 208. See also Motion Picture Association of America v. Oman, 969 F.2d 1154, 1156 (D.C. Cir. 1992) (retroactive rulemaking prohibited unless authorized by statute). Moreover, unlike the situation in Georgetown University Hospital, here there would be no retroactive rulemaking. This is so because even if the new rules applied, the Commission would not be "altering the past legal consequences of past actions" or "chang[ing] what the law was in the past." 488 U.S. at 219 and 220 (emphasis in original) (Scalia, J. concurring). As the D.C. Circuit has stated: "It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking ...." Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989). See also Landgraf v. USI Film Products, 114 S. Ct. 1483, 1499 (1994) ("A statute does not operate 'retrospectively' merely because it . . . upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before it enactment."). In this regard, we note it is well-established that the FCC may apply new rules to the processing of pending applications. See, e.g., Storer Broadcasting v. United States, 351 U.S. 192 (1956); Hispanic Information and Telecommunications Network v. FCC, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) ("The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed."). This, in fact, is the situation Appellants now face because, in accordance with the Court's instructions, we have reinstated Appellants' applications nunc pro tunc. Legally, then, these applications have been pending since they were filed and were pending when we amended our processing rules for unserved area applications.

17. Courts frequently have analyzed whether to apply particular agency adjudicative decisions retroactively in light of five factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of the law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden that a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on an old standard.

Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

18. One of the matters that we must resolve is whether to apply the revised five-year fill-in period to the reinstated applications. In 1987, in the Second Report and Order, the Commission established that cellular licensees would be granted five-years to complete construction within their MSAs. During this period no competing cellular applications could be filed. Under the 1987 rules, the five-year term commenced on the date that the first construction authorization in the market was granted. In virtually all of the markets, it was the wireline carrier's construction authorization that started the five-year period. As a result, the Block A (nonwireline) licensee was allowed less time than the Block B (wireline) licensee to fill in its MSA.

19. On May 31, 1989 we amended Section 22.31(a)(1)(i) of the Rules to provide a separate five-year fill-in period for each frequency block in each market, commencing on the date of the initial construction authorization for each licensee in each MSA. See Order on Reconsideration of Second Report and Order, supra. Our decision amending the fill-in rules was based upon a determination that the initial rules denied the second licensee in an MSA the same opportunity afforded the initial licensee. As a result, the nonwireline licensee was generally handicapped in two respects; it had a shorter time to construct and initiate service, and inadequate time to determine where expansion was needed before it faced competing applications to cover unserved areas. Therefore, to eliminate these inequities and to further our objective of creating an orderly and predictable process of accepting applications to expand or modify the CGSAs of licensees, we created separate five year fill-in periods for each licensee.

20. The second licensee's separate fill-in period had expired at the time the first unserved area applications were filed in the Minneapolis - St. Paul and Los Angeles markets, and thus this rule change is not an issue in these markets. The creation of a separate fill-in period raises an issue only in Phoenix, where unserved area applications for Block A frequencies were filed by McElroy, JAJ, and Metro Mobile, the incumbent Block A licensee since 1984. On January 13, 1988, the five-year fill-in period for the Block B licensee ended and, hence, so did the fill-in period for the Block A frequencies under the rules in effect at that time. On December 14, 1988, Metro Mobile filed an application for three additional cell sites (the "three cell application") within the Phoenix MSA. On January 17, 1989 McElroy filed a competing application to serve the same areas. Thereafter, on March 10, 1989, Metro Mobile filed a major amendment to the "three cell application" to expand its CGSA by adding or modifying seven cells in addition to the three cells proposed by the "three cell application" (the "ten cell application").[12] Twelve days later, JAJ filed an application for the unserved areas of Phoenix. Then, on April 6, 1989, the Bureau dismissed, as premature, all of the unserved area applications filed at that time by nonlicensees in each of the MSAs.[13] Thereafter, pursuant to the amended rules[14] adopted on August 24, 1989, the fill-in period for the Block A licensee in the Phoenix MSA was extended until October 5, 1989.[15]

21. Based on the five Retail Union criteria, we believe that the current fill-in rule should apply in Phoenix. Although this is the first time that we have decided whether the current fill-in rule should apply to pending applications for unserved areas pending before the current rule became effective, we do not view it as a case of first impression or a substantial departure from the Commission's prior orders. The recognized rights of nonwireline

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[12] In a companion proceeding, both of Metro Mobile's applications were ultimately reinstated nunc pro tunc. See Metro Mobile CTS, Inc., supra.

[13] See April Order, supra.

[14] See Order on Reconsideration of Second Report and Order, supra.

[15] In the instant discussion only the events pertinent to this remand proceeding are discussed. A detailed review of the complex history concerning the events and parties in the Phoenix market is contained in Metro Mobile CTS, Inc., supra.

applicants and licensees have been evolving since the inception of cellular service.[16] Nor does the application of the current fill-in rule represent an abrupt departure from the Commission's processing rules and practices. Rather, the original fill-in rule was already in place when McElroy and JAJ filed their applications. The amendment to the fill-in rule only had the effect of delaying the time when unserved area applications could be filed. The amendment to the fill-in rule is one of several revisions to the cellular rules that the Commission implemented, all of which were intended to give wireline and nonwireline licensees equal flexibility to modify their cellular systems according to the changing demands of their service areas.[17] This series of rule changes furthered the Commission's principal goals of making cellular service available to the public as rapidly as feasible while still promoting competition to the extent possible. Indeed, since the issue of whether nonwireline licensees should have a separate fill-in period was before the Commission on reconsideration at the time they filed their applications, McElroy and JAJ could not have reasonably regarded the existing fill-in rule as settled law. Accordingly, our application of the revised fill-in rule does not constitute a case of first impression or an abrupt departure from a well-established practice. Rather, applying the current rule to the McElroy and JAJ applications in Phoenix represents a reasonable approach to filling a void in an unsettled area of the law.

22. McElroy and JAJ do not fare well on the next Retail Union factor - reliance. The modification of Section 22.31(a)(1)(i) was effected without undue surprise to McElroy and JAJ. Well before McElroy and JAJ filed their applications in Phoenix, petitions for reconsideration of the Second Report and Order were filed, seeking, inter alia, the establishment of a separate fill-in period for the second authorized licensee in each MSA. The fact that petitions for reconsideration had been filed was published in the Federal Register. 52 Fed. Reg. 23,719 (June 24, 1987). As we have pointed out, the amendment of Section 22.31(a)(1)(i) was unsettled and the issue of whether the fill-in rule might be amended to place both cellular licensees in a given market on par with each other was an open question at the time McElroy and JAJ filed their applications. Consequently, McElroy and JAJ had constructive notice that the actions taken in the Second Report and Order were

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[16] See, e.g., Land Mobile Radio Service, Second Report and Order in Docket 18262, 46 FCC 2d 752 (1974) (Only wireline telephone companies were allowed to construct and operate developmental cellular systems.); Memorandum Opinion and Order (Reconsideration of Docket 18262), 51 FCC 2d 945 (1975) (If non-wireline carriers could demonstrate their ability to implement cellular service at the licensing phase, their applications would be considered along with those of the wireline carriers.); Cellular Communications Systems, Report and Order in CC Docket No. 79-318, 86 FCC 2d 469 (1981) (A separate five-year frequency allocation for wireline carriers was established as the most practical way to avoid comparative hearing and their attendant delays, and thus hasten the availability of cellular service to major metropolitan areas, and at the same time serve as an incentive for applicants competing for nonwireline frequencies to reach settlements.); Second Report and Order, supra, (Each existing cellular licensee or permittee was given five years to expand service within its MSA free from competing applications, running from the date of the first construction authorization granted in the MSA); and Order on Reconsideration of Second Report and Order, supra, (Independent five-year fill-in periods for wireline and nonwireline licensees or permittees in each MSA were established).

[17] Id.

subject to change and the changes might well alter the Commission's criteria for determining the fill-in period available for second licensees. By choosing to rely on a rule that was under reconsideration they risked the possibility that the rule could change, and any harm that they may suffer as a result was foreseeable. Moreover, the applications were filed only a few months before the reconsideration order was adopted. Thus McElroy's and JAJ's reliance upon the continuing effectiveness of the former fill-in rule does not present a compelling equitable claim.

23. Applying the current fill-in rule in Phoenix will, as discussed below, result in the dismissal of McElroy's and JAJ's applications to serve the MSA, and thus would significantly burden these parties. Nevertheless, the filing of unserved area applications before the fill-in period was changed does not vest in McElroy and JAJ any inalienable rights in the frequencies for which they had applied. Consequently, we conclude the fact that our action will result in the dismissal of McElroy's and JAJ's applications is outweighed by the public interest benefit of providing Metro Mobile the same opportunity as is afforded to all other cellular licensees to expand or modify their CGSAs over a full five years.

24. Finally, the application of the revised fill-in rule in Phoenix seems likely to further the purpose of the rule in the same measure as it will in future cases. In its Order on Reconsideration of Second Report and Order, the Commission determined that when the period afforded the first licensee expired, the second licensee was left with insufficient time to fill in its CGSA before facing competing applications. In most instances, the first licensee was the wireline carrier, because there were usually fewer wireline applications than nonwireline applications filed per market. This enabled the wireline applicants, in most cases, to reach full market settlements quickly, thereby expediting the selection of the wireline licensee in the market. Applications for the nonwireline frequency block in a given market, by contrast, tended to be much more numerous, making full market settlements more difficult to obtain. Selection of the nonwireline licensee was, therefore, usually through lottery or comparative hearing, both of which typically were more time-consuming than a full market settlement. Shorter fill-in periods also deprived second licensees of adequate time to determine the best areas for expansion. This compelled expansion of service contours before sufficient demand had been developed and generally resulted in higher initial expenditures. Since most construction and operational expenses were incurred at the commencement of a system's operation, having to provide service to the initial area and the area of expansion at the same time imposed financial burdens on second licensees that the first cellular carriers licensed in these markets did not incur. Consequently, the Commission's revision of the fill-in rule placed wireline and nonwireline licensees on more equal footing and advanced the public interest by providing greater assurance that the public would have two competitive cellular systems providing service in every MSA.

25. In light of our analysis under the multi-factor balancing test set forth in Retail Union, we find it to be in the public interest to apply the amended five year fill-in rule to the Phoenix market. Specifically, as set forth in detail in the foregoing discussion, although this is the first time we have addressed the specific issue raised here, we do not view this as a case of first impression or a substantial departure from our prior decisions. McElroy and JAJ have not made any compelling argument for reliance on the prior rule. While application of the new rule will significantly burden McElroy and JAJ, we find that this burden is outweighed by the public interest in fairness to Metro Mobile, which is entitled to the same opportunities as any other cellular licensee. In addition, we conclude that the new rule better serves the public interest because it furthers the Commission's goal of assuring meaningful cellular service competition in every MSA.

26. We now turn to the issue of how the adoption of the Order on Reconsideration of Second Report and Order affected the status of Metro Mobile, McElroy and JAJ in the Phoenix MSA. Metro Mobile became the Block A licensee in Phoenix in 1984. On January 13, 1988, the Block B five year fill-in period ended and, pursuant to the then-effective rules, so did the fill-in period for Block A. As a result, both frequency blocks were open for "unserved area" applications. Accordingly, the applications filed by Metro Mobile on December 14, 1988, and March 10, 1989, as well as those filed by McElroy on January 17, 1989 and by JAJ on March 22, 1989, were mutually exclusive, "unserved area" applications. The status of these applications changed on August 24, 1989. On that date the Order on Reconsideration of Second Report, which created full five year fill-in periods for the second -- in this case Block A -- licensee, became effective. Id. at 5382. As a result, Block A was closed to unserved area applications ab initio and remained so until its fill-in period expired. The reinstated applications filed by McElroy and JAJ are, therefore, unauthorized under the revised rule. In contrast, because Metro Mobile was the Block A licensee, its applications automatically became "fill-in" applications. At the time the Appellants' unserved area applications for Phoenix, Minneapolis - St. Paul, and Los Angeles were returned as premature, the Bureau noted that the Commission's newly adopted fill-in rules might be altered. It, therefore, decreed that the applications filed by the second-authorized licensees, e.g., Metro Mobile, would be retained on file. April Order, supra. Accordingly, McElroy's and JAJ's applications will be dismissed because Section 22.31(a)(1)(i) does not permit unserved area applications during a licensee's five year fill-in period. Metro Mobile's "three cell application" and "ten cell application" are now entitled to be, and will be, processed as "fill-in" applications.

27. On March 10, 1993, the Bureau opened its one day filing window for unserved area applications for both blocks. McElroy and JAJ did not apply on this date. Only one unserved area application for the Phoenix MSA, which was filed by Metro Mobile, was received during this period. Consequently, Metro Mobile is the only legitimate unserved area applicant for the Block A frequencies in the Phoenix market.

28. The final matter requiring resolution concerns the selection of the appropriate definition of a CGSA for purposes of determining the unserved areas within the MSAs for which the above-captioned applications have been filed. Because the current definition of a CGSA was adopted after the Appellants' applications were dismissed and before they were reinstated nunc pro tunc, resolution of this issue requires the same multi-factor balancing we employed in deciding whether to apply the revised fill-in rule in Phoenix. Again, we will apply the Retail Union factors.

29. As we have explained, every cellular system licensee has been given five years to provide service to any area within its MSA. During this "fill-in" period, a licensee has the right to modify its initial authorization to expand the coverage of its CGSA to reach unserved areas within its MSA. That is to say, applications of other carriers to provide service within an MSA are not allowed. Originally, a licensee was allowed to determine the size, shape and location of its CGSA, as long as it was confined to the MSA. The licensee was only required to provide a signal with 39 dBu or higher field strength, determined through use of Carey propagation curves,[18] to at least seventy-five percent of the CGSA. See Cellular

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[18] Carey propagation curves are graphs that licensees were formerly required by Section 22.903 of the Commission's Rules to use for plotting the service contours of a cellular transmitter.

Communications Systems, 86 FCC 2d 469 (1981). As a result, up to 25 percent of a licensee's CGSA - i.e., the area it had undertaken to serve - might be outside the system's reliable service contours as defined by our rules. We found that the public interest was not advanced by continuing to protect incumbent licensees from competing applications for areas that remained unserved, simply because these areas had been designated as part of a licensee's CGSA. See Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, 5 FCC Rcd 1044, 1048 (1990). Therefore, in 1992, we modified the Rules to eliminate reliance on licensee-determined CGSAs. We adopted a mathematical formula for determining a CGSA, based on the distance from a cellular system's transmitter to the system's service area boundary (SAB). We concluded that this methodology more accurately measures the area actually served by the licensee. See Second Report and Order in CC Docket No. 90-6, supra.

30. As with changes in the fill-in rules, it is reasonable to conclude that the Commission's use of a system's SAB to determine the parameters of a cellular licensee's CGSA was not an issue of first impression or an abrupt change in the Commission's rules and policies for the purpose of Retail Union analysis. Rather, this revision represents a refinement of the established requirement that a cellular licensee provide an accurate depiction of the area it intends to serve. This was one of a series of changes in the rules governing the definition of a cellular market and CGSA that the Commission adopted. See Cellular Communications Systems, supra; Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, supra; and Second Report and Order in CC Docket No. 90-6, supra. In addition, we believe that we have shown that applying the revised standard to all pending applications will advance the purpose of the rule, which is to define accurately a cellular system's service contours. Moreover, the burden of applying the new rule is not as significant as the impact of applying the change in the fill-in rule to pending applications because dismissal will not result. Nevertheless, as explained below, we conclude that the Appellants' reasonable reliance on the former rule outweighs the other factors set forth in Retail Union. Therefore, we conclude that applying the revised standard to the Appellants is unwarranted, although we will apply it to the March 10 applicants.

31. Although we have decided that the applications of the Appellants and those of the March 10 applicants will be considered together for the purpose of selection, we also view the two groups as constituting separate classes with regard to which standard should define the unserved areas of the Minneapolis - St. Paul and Los Angeles MSAs. This is because at the time the Appellants' applications were filed licensees were allowed to determine the scope of their cellular system's CGSA and thus any unserved areas in the market. They had no notice that a different standard was contemplated. The Appellants' applications were filed approximately three years before the proposal to define CGSAs by mathematical formula was broached. See Further Notice of Proposed Rule Making in CC Docket No. 90-6, 6 FCC Rcd 6158 (1991). Consequently, despite the fact that we have since determined that the SAB standard more accurately depicts a cellular system's actual service contours, the Appellants reasonably based their proposals upon the then-authorized licensee's self-determined CGSA. Furthermore, Appellants reasonably expected that the standard would be in effect at the time licensees were selected for the unserved areas of the three MSAs. When they filed their applications there were no indications that the Commission was not fully satisfied with this standard. Given the reasonableness of the Appellants' expectations in this regard, we believe that requiring them to amend their applications to comport with the SAB standard would be inequitable. We conclude that this inequity outweighs the other factors discussed above.

32. Conversely, when the Commission adopted the SAB standard, the existing licensees in the Phoenix, Los Angeles, and Minneapolis - St. Paul markets were made aware that any resulting alterations in the scope of their CGSAs were subject to rescission if the Appellants' then-dismissed unserved area applications were ultimately reinstated as a result of their appeals. See Memorandum Order and Order on Reconsideration in CC Docket No. 90-68, 8 FCC Rcd 1363, 1364 (1993). Allowing the Appellants to apply for those areas lying outside the incumbent licensees' CGSA as defined by the licensee does not, therefore, deny the licensees a recognized right or reasonable expectation. Moreover, any harm that they may suffer, i.e., possible reduction of their current CGSAs, was foreseeable. Therefore, if any of the Appellants are selected as the tentative licensees for the unserved areas of the Minneapolis - St. Paul or Los Angeles MSAs, they will be allowed to serve the unserved areas defined by the incumbent licensees' determination of the scope of their CGSAs when the Appellants' applications were filed. In other words, the Appellants will be allowed to serve the unserved areas proposed in their applications and the boundaries of the incumbent licensees' CGSAs will be those that existed at the time their five year fill-in periods expired.

33. The March 10 applicants, however, warrant different treatment, primarily because they could not have relied reasonably on the old rules governing the definition of a CGSA. This lack of reasonable reliance, and the fact that our analysis of the other Retail Union factors favors application of the new rule, lead us to conclude that the March 10 applicants must abide by the SAB standard. The SAB standard was established before the March 10 applications were filed. Furthermore, the fact that the scope of Appellants' interests will be determined by a different standard will not adversely affect, or in any way unjustly prejudice, the March 10 applicants since all of the applications are mutually exclusive and the licensee will be randomly selected.

CONCLUSION

34. Based upon the foregoing discussion, we conclude that a cut-off date with respect to applications mutually exclusive with the Appellants' applications, including Price's, was not established before March 10, 1993. Therefore, the applications of the Appellants and the March 10 applicants are mutually exclusive and the selection of unserved area licensees for the Minneapolis - St. Paul and Los Angeles MSAs will be based on contemporaneous consideration of the applications filed in those markets by the Appellants and the March 10 applicants. We also conclude that if an Appellant is selected as licensee, the CGSA established by the incumbent licensee at the expiration of its five year fill-in period will be used to define the area of the MSA that is unserved. If a March 10 applicant is selected, the prescribed mathematical formula for ascertaining a station's SAB will be used for determining the portion of the MSA that is unserved. In the Phoenix MSA, since the applications of McElroy and JAJ will be dismissed, Metro Mobile is the only applicant for this market.[19]

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[19] Metro Mobile's "ten cell" fill-in application is subject to pending petitions to deny filed by McElroy and JAJ. Consequently, any action on this application will be preceded by the resolution of all the allegations contained in the pending petitions. Moreover, action on both of Metro Mobile's pending applications will be withheld until character allegations raised by JAJ in its opposition to Metro Mobile's petition for special relief, i.e., that Metro Mobile intentionally misdescribed its cell contours in its site map submissions, are resolved.

35. These proceedings involve mutually exclusive and contested applications and therefore are restricted. Accordingly, communication with any Commissioner or any member of the Commission's staff with regard to this proceeding, except as permitted by the ex parte rules applicable to restricted proceedings would violate our Rules. See 47 C.F.R. §1.1208.

V. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED THAT the petition for reinstatement filed by Price Communications Cellular, Inc. IS GRANTED IN PART and its unserved area application, File No. 02685-CL-MP-89, IS REINSTATED NUNC PRO TUNC as of the date it was filed.

37. IT IS FURTHER ORDERED THAT the petition for special relief filed by Metro Mobile CTS of Phoenix, Inc. IS GRANTED IN PART.

38. IT IS FURTHER ORDERED THAT the applications for the unserved areas in the Phoenix Metropolitan Statistical Area filed by McElroy Electronics Corporation, File No. 02639-CL-MP-89, and JAJ Cellular, File No. 02905-CL-MP-89, ARE DISMISSED.

39. IT IS FURTHER ORDERED THAT the petitions for reinstatement filed by Fort Mojave Telecommunications, Inc., S+S Partnership, Warren Communications, Leonard Communications, Inc., and G&S Communications, Inc. and Abington Cellular Partnership ARE DENIED.

40. IT IS FURTHER ORDERED THAT the joint motion for approval of settlement filed by McElroy Electronics Corporation, JAJ Cellular, Los Angeles SMSA Limited Partnership, and Price Communications Cellular, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Rochester Telephone Corporation	)
	)
Petition for Waivers to Implement	)
Its Open Market Plan	)
	)

ORDER

Adopted: March 7, 1995 Released: March 7, 1995

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. Rochester Telephone Corporation (Rochester) recently reorganized itself in a manner intended to facilitate local exchange competition in and around Rochester, New York. It now asks for a waiver of our Part 69 rules to enable it to recover three types of access charges -- the subscriber line charge, the carrier common line charge, and the charge for changing a presubscribed interexchange carrier -- in a form it characterizes as better suited to its new structure and the competitive local marketplace the reorganization is intended to foster. For the reasons stated below, we find the proposed waivers to be in the public interest and grant them.

II. BACKGROUND

2. On February 3, 1993, Rochester filed a petition with the New York State Public Service Commission (NYPSC) proposing an "Open Market Plan" for unbundling network services. Rochester proposed to restructure the provision of services to end users and other carriers in a manner that it expects would permit vigorous competition to develop for local exchange services. After substantially modifying its plan, Rochester reached a settlement agreement with the NYPSC staff, the Communications Workers of America, and Time Warner Communications; and on November 10, 1994, the NYPSC approved the plan.[1] Rochester implemented the plan on January 1, 1995.

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[1] *Petition of Rochester Telephone Corp. for Approval of Proposed Restructuring Plan,* Opinion and Order Approving Joint Stipulation and Agreement, Case 93-C-0103, Opinion No. 94-25 (N.Y. Pub. Serv. Comm'n Nov. 10, 1994) (NYPSC Order).

3. Under its revised Open Market Plan, Rochester Telephone Corporation restructured itself into a basic network services company, which retains the Rochester name, and a competitive company, Frontier Communications of Rochester (Frontier), subject to intrastate regulation as a non-dominant carrier.[2] Rochester provides basic network services, such as interstate access. It also provides, on an unbundled, non-discriminatory basis, the local loop, switching, and transport functions that reseller carriers need to provide local exchange telephone service. It offers these intrastate services as a wholesaler, at discounted prices lower than its standard retail rates.[3] Initially, Rochester also continues to provide local exchange telephone service to most customers as a retailer, and will continue as the default carrier for customers not selecting other providers. Frontier and other competing local service providers may purchase network services, *i.e.*, local loop, switching, or transport services, from either Rochester or alternative providers, or they may provide the underlying services over their own network facilities.[4] Thus, competing local service providers, including Frontier, may provide service to end users in a number of ways: they may buy all network elements from Rochester; they may buy local loops from Rochester and deploy their own switching and transport networks; or they may deploy their own local loop facilities and buy Rochester's switching and transport services.[5]

4. While Frontier has yet to offer more than Centrex, high-capacity private line, and voice mail services, it and competing local service providers are free to offer all retail telephone services and attract end user customers away from Rochester's offerings. Ultimately, Rochester expects Frontier and competing providers to expand their retail operations, leaving Rochester with few direct relationships with end user customers.[6] AT&T has already begun taking out full-page newspaper advertisements to attract local service customers.[7] Rochester also took other actions as part of the plan approved by the NYPSC: it reduced its intrastate rates substantially

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[2] The petition, and the comments on that petition and replies, refer to the network services company (Rochester) as "R-Net" and to the competitive retail provider (Frontier) as "R-Com." Both these companies are owned by a holding company, which also owns companies providing long-distance, wireless, and network systems services, as well as smaller local telephone companies spread throughout the United States.

[3] *Compare MTS and WATS Market Structure*, CC Docket No. 78-82, Phase I, Third Report and Order, 93 FCC 2d 241, 258 (1983) (*Access Charge Order*); *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7403, para. 65 (1992), *vacated in part and remanded sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), *reaffirmed in pertinent part on remand*, 9 FCC Rcd 5154, 5202, para. 111 (1994) (*Expanded Interconnection Remand Order*), *appeal pending* (prohibiting distinctions between interstate rates charged to carriers and those charged to end users).

[4] NYPSC Order at 8-11, 25-36 & Appendix (Joint Stipulation and Agreement); Rochester Petition at 1-6.

[5] Rochester Petition at 9.

[6] *Id.* at 6, 8.

[7] *See, e.g.*, The Rochester Democratic and Chronicle, Jan. 12, 1995 at 9A.

and committed to future reductions; it promised service quality and customer service enhancements; it unbundled its network to permit full interconnection with competing networks, and offered reciprocal compensation between Rochester and competing local service providers; and it took steps toward providing local number portability.[8]

III. POSITIONS OF THE PARTIES

A. Rochester Petition

5. On July 29, 1994, Rochester filed a petition requesting waivers of Part 69 of our rules to harmonize its interstate common line rates with its implementation of the revised Open Market Plan. First, Rochester proposes that, when it provides subscriber lines to Frontier or other local service providers, it recover the interstate subscriber line charge (SLC), *i.e.*, the flat monthly rate element that local telephone companies typically recover directly from end users, from the carriers that have a direct relationship with end user customers.[9] Rochester argues that it will not have direct relationships with end user customers served by competing local service providers, and although it could bill these end users directly for the SLC, such a billing arrangement would impose unnecessary costs. Moreover, according to Rochester, such billing would be confusing to end users who would be faced with two bills for local telephone service or charges from two different local telephone companies on the same bill. Instead, Rochester proposes to bill the SLC to carriers that purchase subscriber lines to resell to end users. These carriers, in turn, would recover these costs from their end user customers.[10] Rochester also proposes to require those reselling subscriber lines to certify that they charge end users no more than the applicable federal SLC charge, plus tax surcharges. Rochester also proposes to treat the one-time charges for changing an end user's pre-subscribed long-distance carrier in the same way that it treats the SLC, since those charges also, are typically charged directly to end users.[11]

6. Second, Rochester requests a waiver from the current requirement that it recover the interstate carrier common line (CCL) charge on a per-minute basis from interexchange carriers (IXCs) that use local exchange companies' (LECs') subscriber lines to originate or terminate interstate calls.[12] Instead, Rochester seeks authority to collect a flat-rate charge, which it refers to as the Link Common Line charge, in lieu of the per-minute CCL charge, from any entity that buys Rochester's wholesale subscriber lines but does not use switching provided by Rochester. Rochester argues that, because it will be unable to measure the originating or terminating

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[8] NYPSC Order at 20-23 & Appendix at 44-49, 52-53.

[9] 47 C.F.R. § 69.104.

[10] Rochester Petition at 7-11.

[11] *Id.* at 11-13. This proposal would require a waiver of the existing charge for such services as set forth in *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Memorandum Opinion and Order, 101 FCC 2d 911, 932 (Appendix B, para. 27) (1985).

[12] 47 C.F.R. § 69.105.

minutes of use (MOU) on lines for which it does not provide the local switching function, it is impractical to assess the per-minute CCL charge in these circumstances. It proposes to base that initial flat-rate monthly charge on its average subscriber's CCL payment -- that is, by multiplying the average monthly MOU of its subscribers by its per-minute CCL rate. Rochester notes that the use of a study-area-wide average MOU per line eliminates the possibly impractical, and almost certainly contentious, task of tracking individual common lines lost to switching competitors and the volume of interstate access MOUs associated with such common lines. Furthermore, it proposes to adjust the per-minute CCL charge annually to account for usage growth, as required by the price cap rules.[13]

7. Rochester argues that the waivers it requests are in the public interest and satisfy the legal standard for waivers of our rules. According to Rochester, the Open Market Plan's unique pro-competitive provisions constitute "special circumstances" justifying a waiver. Rochester contends that the Commission's existing rules were drafted to address the traditional relationship between LECs, IXCs, and end users, and do not contemplate the extensive resale of LEC subscriber lines or the unbundling of subscriber lines from switching functions that Rochester's plan makes possible. Rochester asserts that the Open Market Plan will accelerate achievement of the Commission's pro-competitive goals by: (1) enabling end users to choose among local providers; (2) assuring competing local providers access to elements of the existing local exchange network on unbundled, non-discriminatory terms; (3) permitting the local telephone company to participate in the newly-competitive market without obtaining unfair advantages; and (4) providing a real-world test of a fully-competitive local exchange marketplace that should give useful information to the Commission, state regulators, and companies in the industry.[14] While Rochester states that the waivers it seeks are not essential for it to implement the Open Market Plan, it contends that the waivers would substantially facilitate its implementation of the plan.[15]

B. Comments

8. AT&T and MCI oppose this waiver. They argue that, instead of granting it, the Commission should use this opportunity to conduct broad-based inquiries to develop a framework for addressing the general issue of access reform and telecommunications markets in transition from monopoly to competition, possibly in conjunction with other pending proceedings.[16] MCI asserts that independent proposals and test cases, like that presented by Rochester, are not particularly helpful, arguing that ad hoc decisions will only result in unnecessarily repetitious decisionmaking. It further criticizes Rochester's suggestion that its Open Market Plan could become a test for a fully competitive local exchange market.[17] GTE,

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[13] Rochester Petition at 13-14.

[14] Rochester Petition at 15-18.

[15] *Id.* at 9 n.20, 12 n.26, 14 n.30.

[16] AT&T Comments at 5-7; MCI Comments at 4.

[17] MCI Comments at 4.

on the other hand, agrees with Rochester that experience gained from the proposed real-world test of a fully competitive local exchange marketplace will provide valuable information that may be useful in other parts of the country with similar market conditions.[18] GTE and Southwestern Bell (SWBT) state that the petition demonstrates the need for the Commission to adopt a more flexible access charge structure, as proposed in many other petitions before the Commission. GTE and SWBT contend that the current access-charge structure rules do not permit LECs to meet the needs of customers. They agree that the Commission should act as quickly as possible to make the necessary fundamental changes to the access charge rules, but they support the waiver request.[19] Rochester replies to AT&T and MCI that it is not requesting changes in the Commission rules, only that existing rules be adapted to its new circumstances.[20]

9. AT&T and MCI also argue that Rochester has not met the requirements for a waiver. In comments filed prior to NYPSC approval of the plan and before Rochester implemented it, they assert that Rochester has failed to meet the "good cause" standard for granting a waiver because it has not claimed hardship and that Rochester will proceed with its reorganization with or without the waiver. MCI also states that Rochester has not shown how its creation of two new subsidiaries will better serve the public interest.[21] In addition, AT&T and MCI challenge Rochester's assumption that Frontier will be non-dominant.[22] Sprint and AT&T contend that Commission action on this waiver would be premature before the NYPSC granted Rochester's petition for a reorganization, although Sprint argues that Rochester should be entitled to timely Commission action once the NYPSC has approved Rochester's reorganization.[23] Rochester defends its characterization of Frontier as non-dominant, stating that Frontier likely will not even offer any jurisdictionally interstate services itself, and, if it does, it will be similar to Rochester's non-dominant long distance affiliate.[24]

10. If a waiver is to be granted, AT&T is not opposed to Rochester's proposed treatment of the charge for changing presubscribed carriers. AT&T argues, however, that rather than granting case-by-case waivers, the Commission should replace the rate structure of existing SLC and CCL charges with a more economically rational one. It notes that long-accepted principles of economic efficiency support recovery of the non-traffic-sensitive costs of the subscriber line plant through a non-traffic sensitive charge to the direct cost-causer, the subscriber. AT&T notes that it has always supported this policy and now suggests that the Commission implement

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[18] GTE Comments at 3.

[19] *Id.* at 4-6; SWBT Comments at 1-3.

[20] Rochester Reply at 4.

[21] AT&T Comments at 4; MCI Comments at 3.

[22] AT&T Comments at 4 n.6; MCI Comments at 6.

[23] AT&T Comments at 3-4; Sprint Comments at 2 & attachment at 9.

[24] Rochester Reply at 6.

it by eliminating the CCL charge and recovering any resulting revenue shortfall through an increase in the SLC. AT&T predicts that such a restructuring of rates would ensure that common line cost recovery mechanisms do not distort or undermine local competition.[25]

11. MCI states that it has no fundamental objection to Rochester's proposal for recovery of the CCL on a flat-rate per subscriber line basis. Still, MCI questions why Rochester cannot secure the relevant MOU data from other carriers. MCI explains that IXCs now supply LECs with another type of data that the LECs do not calculate themselves: the percentage of MOU that are interstate traffic (otherwise know as the Percentage of Interstate Usage (PIU)).[26] Rochester acknowledges this possibility, but asserts that the reliability of PIU reports is bound to become even more suspect (as compared to a flat-rated CCL charge) than they already are with the introduction of additional carriers.[27] MCI also argues that, without the ability to measure MOU, Rochester would be unable to compute the growth in MOU per line, which growth figure is needed in the formula for a price cap index. Rochester responds that it would calculate the growth rate based on the growth in the total number of retail and wholesale subscriber lines and the growth in MOU per line on the lines for which it provides switching and thus is able to measure MOU.[28]

III. DISCUSSION

12. Under Section 1.3 of our rules, we are authorized to grant waivers "if good cause therefor is shown."[29] As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest."[30] In this case, we find that, by unbundling subscriber lines from other network functions, Rochester creates a situation where there may be no direct relationship between Rochester and end users due to the presence of local service resellers from whom end users may obtain service. The absence of a direct relationship between a local exchange carrier such as Rochester and end users was not contemplated when the Commission created the rules governing the recovery of access charges. We find that the presence of resellers represents the kind of special circumstances that justify waivers of our rules for recovery of the SLC, presubscription change charge, and CCL charge. We also find that the requested waivers are in the public interest.

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[25] AT&T Comments at 6-7.

[26] MCI Comments at 5-6.

[27] Rochester Reply at 5-6.

[28] Letter from Michael J. Shortley, III, Senior Attorney, Frontier Corporation to William F. Caton, Acting Secretary, Federal Communications Commission, Jan. 19, 1995.

[29] 47 C.F.R. §1.3.

[30] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

13. Rochester's unbundling plan is an encouraging experiment. Rochester's readiness to move towards full local competition and New York State's support for this experiment are promising developments in the progress toward full competition in local markets. As AT&T, MCI, and Rochester all recognize, there are already a number of pending petitions that raise the issue of how the rate structure for access charges should be changed for local telecommunications markets in transition to competition.[31] We do not believe that we should delay efforts by individual carriers to experiment with measures to facilitate competition in local markets until we have completed a comprehensive review of our access charge rules. Rather, we are firmly committed to the rapid introduction of competition in local exchange markets. Competition should produce lower prices, improve services, and yield an innovative and broadly accessible communications network. There is no indication that the Rochester plan will in any way impair universal service in the Rochester area.

14. Contrary to MCI's views, we believe that experimentation in this area may produce useful data about the effect of alternative rate structures on the development of competition. Thus, we support the efforts of individual LECs to begin the transition to full competition in the local exchange. We find that the possibility of fundamental reform in the future not only is consistent with, but may be facilitated by, granting a waiver in this instance. Competition seldom takes one particular form, and the competitive experience that is developed under Rochester's plan will likely provide valuable insights even in markets that develop differently.

15. Similarly, we reject MCI's objections that we not grant this waiver because Rochester has not claimed hardship or equity justifications or because Rochester has not shown that its corporate reorganization will serve the public interest. Our standards for granting a waiver do not require petitioner to show "hardship" *per se*,[32] nor do they require Rochester to prove that its corporate reorganization is in the public interest. Approval of local telephone corporate reorganizations falls within the province of state authorities, although the Commission reviews reorganizations or aspects thereof that implicate particular federal interests.[33] Rochester's reorganization has already been implemented and the instant waiver petition does

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[31] *See, e.g.*, Ad Hoc Telecommunications Users Committee, Petition for Rulemaking, April 15, 1994; National Association of Regulatory Utility Commissioners' Petition for Notice of Inquiry Concerning Access Issues, June 25, 1993.

[32] While MCI relies on *Petitions for Waiver of Transport Rate Structure and Pricing Requirements*, 9 FCC Rcd 796, 800 (Com.Car.Bur. 1993), that decision only refers to hardship and inequity as two examples of the special circumstances that could justify a waiver.

[33] Commission approval is necessary for, *inter alia*, the transfer of interstate authorizations and for waiver of study area boundaries. *See, e.g., Applications of Craig McCaw and AT&T For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, 9 FCC Rcd 5836 (1994) recon. pending; *GTE Southwest and Pioneer Telephone Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, 9 FCC Rcd 7785 (Accounting and Audits Div. 1994).

not seek our approval for that transaction.[34] Furthermore, we find, below, that Rochester has shown a public interest justification for this waiver.

16. We find that Rochester's proposal to recover the SLC from carriers that purchase and resell its subscriber lines, rather than from the ultimate end user customers, is a reasonable way to recover subscriber line costs when a separate carrier leases lines from Rochester and resells service to end users and is in the public interest. Rochester's proposal offers an administratively efficient modification that is consistent with our policy of requiring that these costs be recovered on a per line basis. The only opposition to this proposal is AT&T's general opposition to the existing manner of recovering interstate common line costs. We note that even if we were to adopt AT&T's suggestion to eliminate the CCL and recover the shortfall via an increased SLC, which is beyond the scope of this proceeding, Rochester would still need a mechanism to recover the SLC from carriers reselling Rochester subscriber lines to end users. We conclude that it would be in the public interest to permit Rochester to recover these costs as it proposes. For similar reasons, we also find that this same treatment is reasonable for recovering pre-subscription change charges. Neither of these changes will have any effect on Rochester's total revenues.

17. Rochester's proposal for recovering its CCL charges from competing local service providers that purchase its subscriber lines, but not its local switching services, also appears reasonable. Rochester proposes to charge each such carrier a flat-rated CCL charge equal to the total in CCL charges that the carrier would pay if each of the lines it is reselling carried the same level of traffic as Rochester averages on its subscriber lines. This procedure appears to be an administratively efficient means of recovering common line costs and to avoid the likely verification difficulties and controversies associated with relying on MOU levels reported by reseller customers. Rochester's proposal also makes it unnecessary to track the volume of interstate MOU over common lines connected to switching competitors, which would require data that might well be competitively sensitive and costly to ascertain. Moreover, Rochester's proposal would recover a greater portion of its common line costs on a flat-rate basis, and we have consistently found that recovery of non-traffic sensitive costs, such as common line costs, on a flat-rate basis is economically efficient.[35]

18. Finally, the use of the average MOU per subscriber line makes it unlikely that Rochester will over-recover common line revenues from retail customers that take service from competing providers of local switching. We reach this conclusion because the customers likely to be the most attractive to competing local service providers that do not use Rochester's local switching are those with higher than average MOU per line. For these customers' traffic, Rochester would collect a flat-rate charge equal to the average in CCL payments per line, rather than collecting the above-average payment that it would otherwise have received (the per-minute CCL charge times the above-average number of interstate minutes on their lines). We therefore

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[34] The NYPSC approval of the reorganization renders moot the AT&T and Sprint arguments that Commission action on this petition is premature.

[35] *See, e.g., Access Charge Order*, 93 FCC 2d at 277-78.

conclude that Rochester's proposal for recovering CCL charges from competing local service providers would serve the public interest.

19. We decline, however, to adopt Rochester's proposal to use the growth in subscriber lines and the growth in MOU for lines it can measure to calculate the growth rate measure required for adjusting the applicable price cap index for its common line basket. This approach implicitly assumes, without substantiation, that the growth in MOU for lines Rochester cannot measure is the same as the growth on lines it can measure. Rochester offers no justification for this assumption. Indeed, Frontier and other local service providers may well seek to attract subscribers with higher-than-average rates of growth in MOU on their lines, and may stimulate demand through aggressive advertising and related activities. The formula that currently applies to the common line price cap basket reduces the price cap index to adjust for half of the growth in MOU per line. If the traffic growth on lines that Rochester cannot measure exceeds the rate of growth on the lines that it can measure, then the traffic growth figure used to calculate the common line price cap index will be understated, and thus the price cap applicable to Rochester's CCL rates will be artificially high.[36]

20. Instead, we direct Rochester to calculate the growth in MOU in a manner that reasonably estimates the growth rates of competitive providers of local retail service that use Rochester's subscriber lines. For instance, Rochester might consider proposing use of the traffic growth rate of its affiliate, Frontier, as a surrogate for other carriers that use Rochester's common lines in connection with other parties' switching service. Thus, Rochester could argue that Frontier's traffic growth data is comparable to that of other competing firms because Frontier is likely to pursue and secure a customer base comparable to that of its competitors. At the same time, Rochester should be able to place full reliance on data supplied to it by its corporate affiliate. We would also consider, in the tariff process, reasonable alternative mechanisms suggested by Rochester. Such a mechanism would make it very likely that, in the future, as CCL rates are adjusted under the current price cap formula, the CCL rates (those paid both by Rochester's access customers and by local service providers that resell Rochester's common lines) and the total CCL revenues received by Rochester would be no greater than they would be in the absence of the Rochester plan.

21. Our decision to permit Rochester to use the average MOU on the lines it can measure to calculate the level of the flat-rate CCL charge is consistent with our decision *not* to permit Rochester to use the average rate of MOU growth on the lines it can measure to calculate the common line price cap index. In the former case, Rochester's proposal is not likely to lead to excessive rates or over-recovery of revenue. In fact, we believe it may be more likely to result in under-recovery. In the latter case, however, under the formula that currently applies to the common line price cap basket, Rochester's proposal may result in CCL rates and total

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[36] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6793-95 (1990) (*LEC Price Cap Order*); 47 C.F.R. §61.45(c). If the growth variable is understated, the index would not be adjusted down by a sufficiently large amount, and the LEC would be permitted to raise its CCL rates to levels higher than would otherwise be allowed.

common line revenues that are too high. Accordingly, we require the use of a more accurate surrogate for MOU growth to calculate the common line price cap index.

22. These waivers are predicated on the continued existence of the current rules for recovering CCL charges. If we modify these rules such that Rochester need only rely on data to which it has direct access,[37] these waivers would no longer be effective. Instead, the new rules would supersede these waivers.

23. As the instant petition relates only to federal access charges levied by Rochester, we do not address whether Rochester's retail affiliate, Frontier, is a non-dominant carrier. Moreover, in light of our long-standing prohibition against restrictions on the resale of common carrier services,[38] we deny Rochester's proposal to impose a pricing restriction on resellers -- that is, requiring purchasers of its subscriber lines to impose a federal SLC no more than the SLC charged by Rochester. The charges levied by resellers are not at issue in this proceeding.

IV. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i) and 201-205 of the Communications Act, 47 U.S.C. §§ 154(i) and 201-205, and Section 1.3 of the Commission's rules, 47 C.F.R. §1.3, Rochester Telephone Corporation's petition for waivers of Sections 61.45(c), 61.46(d), 69.104, 69.105, and 69.203 of the Commission's Rules, 47 C.F.R. §§ 61.45(c), 61.46(d), 69.104, 69.105, and 69.203, IS GRANTED to the degree noted above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[37] *See, e.g., Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994).

[38] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), *amended on recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom. American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); *AT&T Communications*, Notice of Apparent Liability for Forfeiture and Order to Show Cause, FCC 94-359 (released Jan. 4, 1995).

Appendix A: Parties Filing Comments

Comments

1. American Telephone & Telegraph (AT&T)
2. GTE
3. MCI Telecommunications (MCI)
4. Southwestern Bell Telephone (SW Bell)
5. Sprint Communications (Sprint)

Reply Comments

1. AT&T
2. Rochester Telephone

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Rochester Telephone Corporation, Petition for Waivers to Implement its Open Market Plan

In January 1995, Rochester Telephone Corporation (Rochester Telephone) implemented a reorganization under its Open Market Plan to facilitate local exchange competition in and around Rochester, New York, based on an agreement with the New York Public Service Commission (NYPSC) staff, the Communications Workers of America, and Time Warner Communications. In this Order, the Commission grants waivers of the Part 69 rules to permit Rochester Telephone to recover certain access charges in a manner suited to its new structure and a competitive local marketplace. The Order grants flexibility in recovery of the subscriber line charge, the carrier common line charge, and the charge for changing a presubscribed interexchange carrier because Rochester finds it impractical to bill end users directly, as provided in the Commission's rules in cases where other carriers resell Rochester's subscriber lines to end users.

I write to emphasize the significance of this Order in the context of other issues regarding competition in the local exchange that are currently before the Commission. First, this decision on aspects of the Rochester Open Market Plan begins the review of access reform plans currently before the Commission, including plans proposed by NYNEX and Ameritech, which raise comparatively greater issues for review at the federal level.[1] Along with the Commission's recent decisions on expanded interconnection,[2] these access reform plans will continue to establish the terms under which a greater level of competing service will be offered to end users. Second, the waiver provisions in this Order concerning recovery of the carrier common line charge are subject to the Commission's decision in the pending review of price caps for local exchange carriers.[3] I previously stated and continue to believe that we are not yet at a point where the public can rely on the market to set prices for all services, especially with respect to services provided to residential areas.[4] Yet, rapid changes in the local exchange marketplace will underscore the importance of transitioning toward a streamlined regulatory structure where sources of competition are evident in the local marketplace. Therefore, this decision is important because of its role in the transition toward competition in specific services, and I look forward to addressing the related pending issues expeditiously.

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[1] See NYNEX Petition for Waiver of Parts 61 and 69, DA 93-1537 (filed December 15, 1993) and Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region (filed March 1, 1993).

[2] See Expanded Interconnection with Local Telephone Compaany Facilities,CC Docket No. 91-141, Memorandum Opinion and Order, (adopted July 14, 1994).

[3] See Price Cap Review for Local Exchange Carriers, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994).

[4] See LEC Price Cap Review, Notice of Proposed Rulemaking,CC Docket No. 94-1, 9 FCC Rcd 1687 (1994) (Separate Statement of Commissioner Andrew C. Barrett).

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-134
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 65 and 69 of	)	
the Commission's Rules to Reform	)	CC Docket No. 92-133
the Interstate Rate of Return	)	
Represcription and Enforcement	)	
Processes	)	

REPORT AND ORDER

Adopted: March 30, 1995 **Released: April 6, 1995**

By the Commission:

Table of Contents

	para.
I. Introduction	1
II. Background	7
A. Traditional Rate of Return Regulation	7
B. Incentive Regulation	13
III. Unitary Rate of Return	15
IV. Revisions to Represcription Procedures	20
A. Initiating Represcription Proceedings	20
B. Conduct of the Represcription Proceedings	43
1. Overall Procedures	43
2. Participation	58
3. Discovery	65
4. Requests for Individualized Rates of Return	73
V. Cost of Capital Methodologies	76
A. Overview	76

B. Proposed Changes 79
C. Cost of Equity 81
D. Cost of Debt 92
E. Cost of Preferred Stock 106
F. Capital Structure 111
G. State Cost of Capital Determinations 122
H. Miscellaneous issues 126
1. Interexchange Carriers 126
2. Calculation Specificity 127

VI. Enforcement Procedures 129

A. Overview 129
B. Enforcement Mechanisms 132
C. Buffer Zones and Enforcement Period 140

VII. Ordering Clause 145

I. Introduction

1. Part 65 of our rules[1] sets forth procedures and methodologies for prescribing and enforcing the rate of return certain local exchange carriers ("LECs") may earn on interstate access service.[2] The Commission adopted those rules in 1985. In the Notice in this proceeding,[3] we proposed a fundamental reform of those rules in order to reflect the dramatic changes in the telecommunications industry and our regulation of it that had occurred since that time. This Report and Order accomplishes that reform by streamlining our rate of return represcription and enforcement processes in ways that, we believe, will substantially reduce the burden of our regulations on the public and on those LECs still subject to rate of return regulation. The changes achieve a proper balance of regulatory goals by allowing a carrier the opportunity to "maintain its credit and to attract capital"[4] and by ensuring that ratepayers are charged reasonable rates for interstate services.

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[1] 47 C.F.R. Part 65.

[2] Access service includes services and facilities provided for the origination or termination of interstate telecommunications services. 47 C.F.R. §69.2(b). It includes any activity or function that a LEC performs to connect interexchange carriers with their subscribers or end users. LECs are compensated for providing different access services through subscriber line and other access charges. See 47 C.F.R. Part 69.

[3] Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688 (1992) (Notice).

[4] FPC v. Hope Natural Gas, 320 U.S. 591, 603 (1944).

2. When Part 65 was adopted, the Commission used rate of return principles to regulate the rates for the interstate communications services of the American Telephone and Telegraph Company ("AT&T") and all LECs. Since that time, our price cap initiatives have removed all interexchange and most interstate access revenues from such regulation.[5] We have also created optional programs that allow the remaining rate of return LECs to increase their opportunities for increased profit and risks of loss above the levels they would face under traditional, rate of return regulation.[6]

3. To reflect the altered environment as well as our experiences in implementing the Part 65 rules, we change virtually every aspect of our rate of return represcription and enforcement processes for telephone companies. First, we amend the current rule that contemplates a new represcription proceeding every two years regardless of conditions in the capital markets. We replace that rule with one that relies on the yields on ten-year United States Treasury securities to determine when represcription might be warranted. Under this system, we will issue a notice asking whether we should institute a represcription proceeding only if, for six consecutive months, the six-month average of those yields deviates by 150 basis points or more[7] from the yield on these securities measured as of our most recent represcription. After evaluating the responses to such a notice, we will decide whether a represcription proceeding is necessary and will then issue an order that either sets forth a procedural schedule for the proceeding or announces that a represcription proceeding is not necessary.

4. The current rules also establish a "paper hearing" process for represcription proceedings that is modelled after the system used in evidentiary hearings. Because this process contains procedural steps beyond those necessary for a full and complete record, we are adopting streamlined procedures that will reduce the inordinate delays and costs

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[5] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (LEC Price Cap Order), modified on recon., 6 FCC Rcd 2637 (1991), petitions for further recon. dismissed, 6 FCC Rcd 7482 (1991), further modified on recon., 6 FCC Rcd 4524 (1991) (ONA/Part 69 Order), petition for recon. of ONA/Part 69 Order pending, LEC Price Cap Order aff'd sub nom. National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993); Policy and Rules Concerning Rates for Dominant Carriers, Report and Order, and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (AT&T Price Cap Order), recon., 6 FCC Rcd 665 (1991) (AT&T Price Cap Recon. Order), remanded on other grounds sub nom. AT&T v. FCC, 974 F.2d 1351 (D.C. Cir. 1992). We have recently completed a performance review of the AT&T price cap plan. Price Cap Performance Review for AT&T, CC Docket No. 92-134, Report, 8 FCC Rcd 6968 (1993). The Commission has proposed relatively minor adjustments to the AT&T price cap plan based on the performance review. Revision to Price Caps Rules for AT&T, CC Docket No. 93-197, Notice of Proposed Rulemaking, 8 FCC Rcd 5205 (1993). Our performance review of the LEC price cap plan is in progress. Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Notice of Proposed Rulemaking, 9 FCC Rcd 1687 (1994).

[6] Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order, CC Docket No. 92-135, 8 FCC Rcd 4545 (1993) (Regulatory Reform Order), petitions for recon. pending.

[7] Analysts describe changes in yields in terms of basis points. One basis point equals 0.01 percent.

experienced in previous represcription proceedings, yet provide parties full opportunity to present and evaluate relevant evidence.

5. Part 65 now uses a weighted average cost of capital to calculate a unitary, overall rate of return for rate of return LECs.[8] This calculation requires us to determine a cost of equity, cost of debt, and capital structure for LEC interstate access service.[9] To help us determine these components, Part 65 requires the Regional Bell Holding Companies ("RHCs") to undertake complex studies and submit the resulting data for inclusion in the record in represcription proceedings. Because we find the cost of equity studies unnecessary and the cost of debt and capital structure studies unduly complex, we eliminate the rules that require them. To facilitate the represcription process, however, we specify methods to calculate cost of debt and capital structure that rely on readily available data regarding the largest LECs for presumptive use in future represcription proceedings. Under this approach, we will use the specified methodologies in future represcription proceedings unless the record in those proceedings shows that the methodologies would produce unreasonable results.

6. Part 65 had authorized an automatic refund, with interest, of earnings exceeding what the rules refer to as "the maximum allowable rate of return."[10] In the Automatic Refund Decision,[11] the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") remanded this rule to the Commission. Because we find that our tariff review and complaint processes are sufficient to enforce the prescribed interstate rate of return, we eliminate that rule.

II. Background

A. Traditional Rate of Return Regulation

7. The rate of return represcription serves as an essential component of the form of rate of return regulation the Commission has traditionally applied to most telephone companies. Under this form of regulation, telephone companies computed their revenue requirements using the following formula:

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[8] We describe this rate of return as "unitary" because it applies to all rate of return LECs that do not obtain individualized rates of return. We describe it as "overall" to contrast our system with those that combine a prescribed unitary return on equity with company-specific costs of debt and capital structures to produce overall authorized rates of return that would vary among companies. See also infra Section III.

[9] In infra Section V, we explain this calculation in greater detail.

[10] 47 C.F.R. §65.700.

[11] AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988) (per curiam) (Automatic Refund Decision).

Revenue Requirements = ((Rate Base) x (Rate of Return)) + Expenses[12]

The rate for any given service equaled its revenue requirement divided by the demand anticipated for that service.

8. The Commission first prescribed an interstate rate of return in 1967, as part of a comprehensive investigation into the reasonableness of AT&T's interstate rates.[13] Between 1967 and 1984, the Commission represcribed that rate of return four times. Each of these prescription proceedings included traditional evidentiary hearings before an Administrative Law Judge.[14] They resulted in prescribed rates of return that AT&T used in calculating its long distance rates as well as the compensation the Bell Operating Companies ("BOCs") and independent telephone companies received for use of their facilities in originating and terminating interstate calls.

9. With the divestiture of AT&T in 1984,[15] however, the Commission decided to regulate directly the rates LECs charge for originating and terminating interstate calls.[16] In Docket 84-800, the Commission sought to develop procedures and methodologies to address the increased complexity of rate of return regulation in the post-divestiture environment.[17] The resulting Part 65 rules were designed to enable the Commission to represcribe authorized rates of return for LEC interstate access service and AT&T's interstate communications

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[12] This formula expresses the fact that a utility must receive an opportunity to earn revenues sufficient to recover its operating expenses, including taxes and depreciation, and a fair return on prudent investment that results in used and useful plant.

[13] American Tel. & Tel. Co., CC Docket No. 16258, Interim Decision and Order, 9 FCC 2d 30 (1967).

[14] American Telephone and Telegraph Co., Modification of Prescribed Rate of Return, 86 FCC 2d 221 (1981), aff'd sub nom. United States v. FCC, 709 F.2d 610 (D.C. Cir. 1983); AT&T (Docket 20376), 57 FCC 2d 960 (1976); AT&T (Docket 19129), 38 FCC 2d 213 (1972), aff'd sub nom. Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975); AT&T (Dockets 16258 and 15011), 9 FCC 2d 30 (1967).

[15] United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[16] See MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983), modified on further recon., 97 FCC 2d 682 (1983), modified on second further recon., 97 FCC 2d 834 (1984), aff'd in pertinent part sub nom. National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further recon., 99 FCC 2d 708 (1984), aff'd sub nom. American Tel. and Tel. Co. v. FCC, 832 F. 2d 1285 (D.C. Cir 1987), modified on further recon., 101 FCC 2d 1222 (1985), recon. denied, 102 FCC 2d 849 (1985).

[17] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Notice of Proposed Rulemaking, FCC 84-395, 49 Fed. Reg. 32971 (August 17, 1984); Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Supplemental Notice of Proposed Rulemaking, FCC 85-458, 50 Fed. Reg. 33786 (August 21, 1985).

services without engaging in traditional evidentiary hearings.[18]

10. The Part 65 rules establish a "paper hearing" for represcribing authorized interstate rates of return. The process includes notices of appearance, initial submissions, responsive submissions, rebuttals, limited discovery, Common Carrier Bureau ("Bureau") information requests, proposed findings of fact and conclusions, and reply findings of fact and conclusions. Under limited circumstances, the rules permit cross examination, oral argument, and use of separated trial staff. The rules require exchange carrier holding companies meeting certain specified criteria to file notices of appearance, to undertake complex studies using particular methodologies, to include the data resulting from these studies in their initial submissions, to respond to Bureau information requests, and to comply with any discovery orders.[19] The only holding companies that have met these criteria are the RHCs.

11. In 1986, the Commission used the Part 65 rules to represcribe the LECs' rate of return for their interstate access services. That experience, while largely successful, revealed some flaws in the rules. In CC Docket No. 87-463, the Commission proposed to refine Part 65 to eliminate those flaws.[20] Although it recognized that the represcription process might require more fundamental reform in light of the pending price cap initiative, the Commission invited comment only on those revisions that might aid in the next represcription proceeding.[21]

12. That next proceeding occurred in 1990.[22] In initiating it, the Commission rejected suggestions that it wait until it had completed Docket 87-463. Instead, we used the existing Part 65 rules, but waived them to the extent necessary to correct for flaws revealed during the 1986 represcription proceeding and to recognize other post-divestiture

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[18] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Report and Order, CC Docket No. 84-800, Phase II, 51 Fed. Reg. 1795, at paras. 3, 70-72 (Jan. 15, 1986) (Phase II Order), recon. 104 FCC 2d 1404 (1986) (Phase II Reconsideration).

[19] See, e.g., 47 C.F.R. §§65.100(a)(1), 65.102(a), 65.103(a), 65.200.

[20] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket No. 87-463, Notice of Proposed Rulemaking, 2 FCC Rcd 6491 (1987), terminated, 7 FCC Rcd 5949 (1992).

[21] Id. at 6491.

[22] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Order, 5 FCC Rcd 7507 (1990) (1990 Represcription Order), recon. denied, 6 FCC Rcd 7193 (1991) (1990 Represcription Reconsideration Order), aff'd sub nom. Illinois Bell Telephone Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1992) (Illinois Bell v. FCC).

developments.[23] In Illinois Bell v. FCC, the D.C. Circuit affirmed this procedure and recognized that Part 65 allows the Commission to consider a broad array of evidence and methodologies in the represcribing rate of return, including "rate calculation methodologies other than those explicitly spelled out in Part 65."[24]

B. Incentive Regulation

13. Traditional, rate of return regulation affords the regulated company the opportunity to recover through its rates all of its prudently incurred costs that prove used and useful in the provision of regulated service. Because this form of regulation gives the regulated company only minimal incentives to operate efficiently, we have developed alternative forms of regulation that attempt to create efficiency incentives similar to those found in fully competitive markets. Our AT&T and LEC price cap plans reward innovation and increased productivity by regulating prices directly, rather than indirectly through the examination of projected costs and demand as under traditional rate of return regulation. These plans took effect July 1, 1989 and January 1, 1991, respectively.[25] Both plans require telephone companies to adjust their price cap indexes to reflect inflation,[26] certain productivity offsets,[27] and exogenous costs.[28] The LEC price cap plan also requires LECs whose earnings exceed certain levels to share those additional earnings with customers

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[23] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket No. 87-463, Order, 5 FCC Rcd 197, 202-03 (1989) (Interim Prescription Order), recon. denied 7 FCC Rcd 5949 (1992).

[24] Illinois Bell v. FCC, 988 F.2d at 1265-66.

[25] LEC Price Cap Order, 5 FCC Rcd at 6837; AT&T Price Cap Order, 4 FCC Rcd at 2968.

[26] The inflation adjustments reflect changes in the Gross National Product Price Index (GNP-PI) as reported by the United States Department of Commerce. 47 C.F.R. §61.3(p). This is a broad-based index computed by the Federal government that reflects changes in the cost factors of production for a wide spectrum of economic sectors. It is also known as the fixed-weight GNP deflator.

[27] The productivity offset for AT&T is 3.0 percent. AT&T Price Cap Order, 4 FCC Rcd at 2989, 3001. LECs may elect productivity offsets of either 3.3 percent or 4.3 percent. LEC Price Cap Order, 5 FCC Rcd at 6796, 6801.

[28] Under price caps, most increases and decreases in a carrier's cost of providing regulated service are treated as "endogenous" changes, and do not result in adjustments to the carrier's price cap indexes. The Commission, however, has identified certain types of cost changes, triggered by administrative, legislative, or judicial action that are beyond the carrier's control, that should result in adjustments to those indexes. LEC Price Cap Order, 5 FCC Rcd at 6807; AT&T Price Cap Order, 4 FCC Rcd at 3187. The Commission concluded that failing to recognize these cost changes through price cap index adjustments would unjustly punish or reward the carrier. LEC Price Cap Order, 5 FCC Rcd at 6807. Accordingly, the Commission found that those types of cost changes should be treated "exogenously" in order to ensure that price cap regulation did not lead to unreasonably high or unreasonably low rates.

through prospective rate reductions.[29]

14. We have more recently adopted an optional incentive plan that gives non-price cap LECs, who are willing to assume more risk, the opportunity to realize increased profits while remaining under rate of return regulation.[30] This plan permits non-price cap LECs to retain earnings up to 1.5 percent above the rate of return prescribed for LEC interstate access service. In exchange, LECs electing this form of regulation must file tariffs that remain in effect for two-year periods. The LECs must target these rates to earn the prescribed interstate rate of return. During that two-year period, these LECs may increase their tariffed rates only if necessary to produce earnings 0.75 percent below the prescribed interstate rate of return.[31]

III. Unitary Rate of Return

A. Background

15. In the Notice, we identified a number of reasons to justify significantly revising the rate of return prescription procedures and methodologies set forth in Part 65. Most importantly, we recognized that we had promulgated those rules at a time when we regulated virtually all the interstate services of the post-divestiture AT&T and the BOCs, as well as the other LECs, on a rate of return basis.[32] We stated that since that time, technological change had made possible an explosion of regulated and nonregulated services offered by carriers. We also recognized that, in response to these developments, we had introduced price cap regulation for the interstate services of AT&T and the largest LECs, including the BOCs.[33] We noted that the carriers who remained subject to rate of return regulation then accounted for only about 6.3 percent of total LEC revenue.[34] We stated our belief that these changes

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[29] LEC Price Cap Order, 5 FCC Rcd at 6801-02, paras. 123-27. More specifically, price cap LECs may increase their interstate rates to the extent necessary to earn a 10.25 percent interstate rate of return. LECs electing the 3.3 percent productivity offset may retain all interstate earnings up to 12.25 percent, 50 percent of interstate earnings between 12.25 percent and 16.25 percent, and no interstate earnings above 16.25 percent. LECs electing the 4.3 percent productivity offset may retain all interstate earnings up to 13.25 percent, 50 percent of interstate earnings between 13.25 percent and 17.25 percent, and no interstate earnings above 17.25 percent. Id.

[30] Regulatory Reform Order, 8 FCC Rcd at 4547.

[31] Id. at 4550.

[32] Notice, 7 FCC Rcd at 4690, para. 13.

[33] Id. at para. 14.

[34] Id.

required us to fundamentally re-examine our rate of return represcription processes.[35] We tentatively concluded that simplified procedures and methodologies could replace the cumbersome and expensive process that we and the telephone industry had confronted in the 1990 represcription proceeding.[36] We requested comment on a detailed set of procedural and methodological issues. We also proposed to retain our current policy of prescribing a unitary, overall rate of return for rate of return LECs.[37] Under this policy, we prescribe a single rate of return, rather than rates of return for individual LECs. This is, moreover, an overall rate of return, rather than a return on equity. Each rate of return LEC must use this prescribed rate of return in computing its interstate revenue requirements, unless the LEC shows that such use would be confiscatory.

16. We address the procedural and methodological issues raised in the Notice, as well as the parties' comments, infra.[38] In this Part, we confirm that we will retain a unitary, overall rate of return for rate of return LECs.[39]

B. Comments

17. For a variety of reasons, commenters overwhelmingly support reforming our represcription procedures and methodologies, but retaining a unitary rate of return for rate of return LECs.[40] OPASTCO, for example, contends that a unitary rate of return benefits small companies, NECA, and this Commission by helping to simplify represcription proceedings and by facilitating the administration of the universal service fund and the long-term support program.[41] Some commenters conclude that a unitary rate of return best balances the competing goals of administrative ease and fairness. These commenters state that developing

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[35] Id. at para. 15.

[36] Id. at para. 16.

[37] Id. at para. 18.

[38] Appendix 1 lists the commenters as well as the short names this Order uses to refer to them.

[39] In infra Section IV.B.4, we address the standard for obtaining an individualized rate of return.

[40] See, e.g., Bell Atlantic Comments at 2; Casco Comments at 1; Frederick & Warinner Comments at 2; SNET Comments at 2; USTA Comments at 4.

[41] OPASTCO Comments at 2. See also Alltel Comments at 2. The universal service fund and long term support program share a common purpose of promoting affordable telephone service throughout the nation. The universal service fund helps carriers operating in high cost areas maintain low intrastate service rates in those areas. See 47 C.F.R. §§69.116, 69.603(c). The long term support program requires LECs that do not participate in the common line pool administered by the National Exchange Carrier Association, Inc. (NECA) to contribute part of their revenue to that pool. The contributions let NECA maintain a nationwide average common line rate equivalent to the rate that would result if all LECs participated in the common line pool. See 47 C.F.R. §§69.2(y), 69.612.

a rate of return for each of the approximately 1300 to 1400 LECs remaining under rate of return regulation would be unnecessarily costly.[42]

C. Discussion

18. Although we reform our represcription procedures and methodologies, as set forth below, we retain our current policy and will continue to prescribe, a unitary, overall rate of return for rate of return LECs. We agree with the commenters that a unitary rate of return best balances our twin policies of promoting administrative simplicity and efficiency and developing a fair rate of return for all affected carriers. Nothing in the record suggests that an appropriately developed unitary rate of return would not operate fairly for all rate of return LECs and their customers. Moreover, the administrative burdens associated with developing separate rates of return for over 1300 affected LECs would be significant, and would impose unnecessary costs on this Commission and on telephone companies and their ratepayers.

19. In retaining our policy of prescribing a unitary, overall rate of return, we recognize that some telephone companies may face exceptional facts and circumstances that warrant rates of return different from the prescribed interstate rate of return. We will not preclude requests for such individualized rate of return. In Section IV.B.4, infra, we address the standard for obtaining them.

IV. Revisions to Represcription Procedures

A. Initiating Represcription Proceedings

1. Background

20. Our Part 65 rules require biennial represcription proceedings that are supposed to begin during January of each even-numbered year.[43] Notwithstanding this provision, the Commission has deferred each required represcription since those rules were adopted. The Notice stated our belief that a calendar-based, biennial requirement does not reflect how the cost of capital for LEC interstate access service changes over time. We also stated that we could use generally available capital market data to predict those persisting changes to the cost of capital that might justify a represcription and that the periodic review of such data would allow us to initiate represcription proceedings only when they are warranted.[44] Consequently, in the Notice, we proposed to replace the automatic, biennial trigger with a

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[42] See, e.g., SNET Comments at 2; USTA Comments at 4.

[43] 47 C.F.R. §65.102(c).

[44] Notice, 7 FCC Rcd at 4691, at paras. 19, 21.

trigger activated by identified changes in capital markets that are likely to persist over time.[45] We invited comment on whether we should adopt such a trigger, and whether the trigger should be automatic or semi-automatic.[46] We also invited comment on how we should measure persistent changes in capital markets;[47] whether we should base the trigger on a single measure of capital costs, and how we might track changes in that measure over time by using a "moving average;"[48] and whether we should specify some minimal period between represcriptions so as to ensure that Commission represcription decisions do not result in unduly frequent changes in interstate rates.[49]

2. Comments

21. The commenters generally support our proposal to replace the existing calendar-based trigger with a trigger activated by identified changes in capital costs.[50] Frederick and Warinner states that the current biennial trigger does not recognize relevant cost of capital developments either in the telecommunications industry or in the financial community, and imposes unwarranted administrative and economic burdens.[51] Bell Atlantic explains that, unlike a calendar-based trigger, a trigger based on capital market developments would reflect how rate of return LECs raise capital, would minimize regulatory costs by avoiding unnecessary represcription proceedings, and would streamline regulation generally.[52]

22. Notwithstanding this general agreement, the commenters disagree about what the trigger should be, about how it should operate, and about all the other issues the Notice raised regarding the trigger. Large LECs, small LECs, and their representatives generally concur on what a trigger driven by changes to capital costs should be and how it should work. These commenters argue that the Commission should base the trigger on long-term debt costs, rather than the cost of equity, because debt costs are directly observable, whereas

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[45] Id. at paras. 19, 21, 25.

[46] Id. at paras. 21, 25. If activated, an automatic trigger would initiate a represcription proceeding without further Commission action. Under a semi-automatic trigger, the triggering event would prompt a Commission inquiry asking whether a represcription proceeding should ensue. Id. at para. 25.

[47] Id. at para. 22.

[48] Id. at para. 23.

[49] Id. at para. 24.

[50] See, e.g., USTA Comments at 32; SWBT Comments at 1-2; OPASTCO Comments at 3; MCI Comments at 4-5; GSA Comments at 6.

[51] Frederick and Warinner Comments at 5.

[52] Bell Atlantic Comments at 4.

measuring equity costs is more controversial.[53] USTA argues for the use of Aa public utility bond yields listed in Moody's Bond Record.[54] According to USTA, such bonds most accurately reflect the capital costs rate of return LECs incur.[55] To ensure that the trigger reflects only significant and persistent changes in capital costs, USTA recommends that a range of 300 basis points, 150 above the midpoint and 150 below the midpoint, be set to mark the boundary between significant and insignificant cost changes.[56] USTA would have the Commission consider initiating a represcription proceeding only if there is a 150 basis point shift in the six-month moving average of Aa public utility bond yields as measured by Moody's, and then only if such a shift continues for six consecutive months.[57] According to USTA, these requirements would help ensure that the trigger only recognizes persistent changes in the capital markets. USTA states that the counting of the six consecutive months should begin with the order completing this rulemaking. At that time, the Commission also should set the initial yield rate that is to be compared with the six-month moving average, according to USTA.[58]

23. USTA describes this proposed trigger as semi-automatic. USTA argues that an automatic trigger would give no discretion to the Commission in determining whether to initiate a represcription proceeding, but would operate objectively and so insulate the Commission from external pressures.[59] USTA doubts, however, that the Commission can devise a truly automatic trigger because the Commission could always interpose its waiver power to prevent the trigger's operation.[60] USTA argues that a semi-automatic trigger would be preferable, because it would afford the Commission more flexibility and could avoid unnecessary represcription proceedings.[61] USTA maintains that, if the Commission nevertheless opts for an automatic trigger, the range should be plus or minus 200 basis points

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[53] E.g., USTA Comments at 34. See also Rochester Comments at 15-16; SNET Comments at 3.

[54] USTA Comments at 33-34. See also Rochester Comments at 15-16; SNET Comments at 3. Moody's Bond Record contains monthly prices, yields, and ratings for individual bond issues, convertibles, and preferred stocks.

[55] USTA Comments at 33-34.

[56] Id. at 34-36.

[57] Id. at 33-34. See also Rochester Comments at 15-16; SNET Comments at 3.

[58] USTA Comments at 36.

[59] Id. at 37.

[60] Id.

[61] Id. at 38. See also OPASTCO Comments at 3-4; SNET Comments at 3.

to promote greater stability and avoid repetitive proceedings.[62] Regardless of the trigger adopted, USTA states that a carrier should be able to seek an individual represcription.[63] Most LEC commenters support USTA.[64]

24. Centel advocates a USTA-type trigger based on a sustained plus or minus 150 basis point deviation from the base rate of Aa utility bonds. Centel also would require that there be at least a 150 basis point deviation in the most recent month from the base rate to "avoid unnecessary represcriptions when changes in the credit markets reverse or correct themselves" in the short term.[65] Additionally, if the triggering event occurs, Centel urges the Commission to consider other factors, including forward-looking evaluations of the cost of equity, in determining whether a represcription proceeding is warranted.[66]

25. GSA proposes a different trigger, one based on changes in the monthly indicator for intermediate term United States Treasury bond interest rates. Instead of using industry bond yields, GSA would have us measure changes in capital costs by monitoring changes to the ten-year United States Treasury security yield indicator prepared monthly by the Council of Economic Advisors.[67] According to GSA, this indicator would reflect fundamental changes in equity costs better than would short or long-term bond yields, and its use would avoid the need to compile and analyze complex stock market data, because the government publishes the indicator monthly.[68]

26. Like USTA, GSA proposes a trigger that includes a range of plus or minus 150 basis points around a midpoint.[69] GSA, however, would have the Commission review changes in the ten-year treasury bond yield indicator in September of each year, and automatically initiate a represcription proceeding if the indicator for the previous month (August) deviated more than 150 basis points from the indicator at the time of the

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[62] USTA Comments at 39. Cf. Rochester Comments at 15-17 (supporting an automatic trigger otherwise composed like USTA's).

[63] USTA Comments at 39. See infra Section B.4. for a discussion of individualized represcription proceedings.

[64] See, e.g., Alltel Comments at 2; Cincinnati Bell Comments at 1-2; Nebraska Comments at 3; Van Horne Comments at 2.

[65] Centel Comments at 3-4.

[66] Id. at 4-6.

[67] GSA Comments at 8-9.

[68] Id.

[69] Id. at 10.

Commission's most recent represcription.[70] According to GSA, the Commission could conclude a represcription proceeding initiated in September in time for the carriers to incorporate the results into their annual access tariff filings in April of the following year. GSA states that if a represcription proceeding were concluded in March, the new midpoint of the range would be the ten-year Treasury Bond yield indicator for the previous month.[71] GSA prefers an automatic trigger for the reasons USTA identifies in its comments; GSA agrees that an automatic trigger would eliminate controversy over when represcription proceedings should start and would operate objectively over time.[72] GSA also says that an automatic trigger would insulate the Commission and carriers from external pressures better than a semi-automatic trigger would.[73]

27. MCI suggests a third model for a capital cost change-driven trigger. MCI proposes a semi-automatic trigger based on changes in a combination of both cost of debt and cost of equity measurements. MCI states that the trigger could rely on long-term interest rates and the average of the discounted cash flow ("DCF") estimates of the RHCs' costs of equity.[74] MCI states that the trigger should require significant changes in these measures. such as a 200 basis point change in debt costs and a 100 basis point change in equity costs. that are simultaneous and last for six months.[75]

28. MCI argues that we should revise Part 65 to provide that the triggering event creates a presumption that represcription should ensue, a presumption that commenters could rebut by showing that the trigger did not accurately identify changes in the cost of capital for LEC interstate access services.[76] MCI would also have the rules state that the need for a change in the prescribed rate of return would be addressed de novo, in any ensuing represcription proceeding.[77] To ensure stability, MCI would require at least one-year between represcription proceedings. MCI would also require a Commission review every six months to determine whether the triggering events had occurred.[78] MCI states that the first

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[70] Id.

[71] Id.

[72] GSA Reply at 6. See also, supra para. 23.

[73] Id.

[74] MCI Comments at 4-6. The DCF method estimates the present value of future cash flows. In infra Part V.C.3, we describe this method in greater detail.

[75] Id. at 5-6.

[76] Id. at 6.

[77] Id. at 7.

[78] Id. at 7.

review following any represcription order would be conducted on its one-year anniversary. At that time, the Commission would check on possible changes in the trigger measures during the most recent six months, according to MCI. Notwithstanding its stability concerns, MCI contends that the Commission should allow petitions for represcription independent of the trigger, although in such cases MCI would have the petitioner bear the burden of showing that a proceeding is warranted.[79] In MCI's view, any order authorizing such a proceeding should not establish a presumption in the ensuing proceeding.[80]

29. FWA and SBA propose still other approaches. FWA states that DCF cost of equity estimates for the Standard and Poor's ("S&P") 400, the RHCs, the 100 large electric utilities or other comparable publicly traded companies might provide appropriate benchmarks to judge the need for represcription.[81] FWA says that tracking a moving average for a single measure of capital costs over time would be a viable basis for determining when a represcription proceeding is warranted. FWA maintains, however, that, in the ordinary course, at least three years ought to separate represcriptions in order to accommodate LEC budgeting for capital recovery, infrastructure development and necessary operational changes.[82]

30. SBA, on the other hand, argues for a semi-automatic trigger based on capital costs incurred by companies similar to the small LECs.[83] SBA states that general indices of capital market health are not representative of the capital costs of small LECs.[84] At any rate, says SBA, the Commission should rely on indices restricted to utilities.[85] An appropriate trigger must also, according to SBA, account for changes in the cost of private and governmental debt.[86]

3. Discussion

31. We conclude that the public interest is best served by adopting a semi-automatic trigger, based on ten-year U.S. Treasury security yields, that employs a 150 basis point change. Under our trigger, we will issue a notice asking whether a represcription should

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[79] Id. See infra Section B.4. for a discussion of individualized represcription proceedings.

[80] MCI Comments at 8-9.

[81] FWA Comments at 5.

[82] Id.

[83] SBA Comments at 7.

[84] Id.

[85] Id.

[86] Id.

ensue, whenever the triggering event occurs evidencing major changes in the capital markets. We delegate power to the Chief, Common Carrier Bureau, to issue such Notices.[87] The triggering event will be a 150 basis point change in the monthly average yield on ten-year U.S. Treasury securities that continues for a six-month period. To establish the starting point for measuring the change, we will compute an average of the monthly average yield on ten-year U.S. Treasury securities for the six months prior to the date of our most recent represcription. Each month, we shall monitor our trigger by comparing this six-month average and the current month's average yield on ten-year U.S. Treasury securities to determine if they differ by 150 basis points or more.

32. There is no dispute in the record about the merit of replacing the current biennial trigger with a trigger based on some measurement of persistent change to the cost of capital. All commenters favor the latter for the reason we cited in the Notice: LEC capital costs do not track the calendar.[88] The commenters disagree, however, about whether the trigger should be automatic or semi-automatic, and about what sort of measuring methodology we should adopt. While we understand GSA's arguments that an automatic trigger would operate "objectively" over time and avoid controversy, we do not believe that such "objective" operation is ipso facto beneficial or that any "automatic" trigger would not engender repeated deferral orders.[89] Represcription proceedings are costly and time-consuming for this Commission and for participants. We think that it would better serve the public interest if we were to evaluate the need for a represcription proceeding once the triggering event occurs.

33. On the question of what the trigger should measure, the commenters basically fall into three groups: (1) one who advocates a mix of debt and equity cost measurements;[90] (2) those who advocate a debt instrument trigger employing Treasury bonds;[91] and (3) those who advocate a debt instrument trigger employing Aa utility bonds.[92] Although the overall cost of capital reflects both debt and equity costs, we find no compelling reason to adopt a trigger based on multiple measures of capital costs. Such a trigger would be unnecessarily complicated for the limited purpose of determining whether we should inquire into whether

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[87] See Appendix 4, 47 C.F.R. 65.101(a).

[88] See e.g., Bell Atlantic Comments at 2; USTA Comments at 32.

[89] See, e.g., Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket No. 87-463, Memorandum Opinion and Order, 3 FCC Rcd 1697 (1988) (deferring 1988 represcription proceedings for one year); Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c), Memorandum Opinion and Order, 3 FCC Rcd 7220 (1988)(deferring 1988 represcription proceedings for an additional six-month period).

[90] MCI Comments at 5-6.

[91] See, e.g., GSA Comments at 8-9.

[92] See, e.g., USTA Comments at 33-34.

sufficient cost of capital changes have occurred to justify a represcription proceeding. A Commission decision to initiate a proceeding would depend on the record developed in that inquiry, which could incorporate multiple measures of both debt and equity costs.

34. As between using debt or equity cost measurements for the trigger, we agree with several commenters that methodologies for measuring changes in the cost of debt are far less controversial, and easier to apply, than cost of equity methodologies.[93] Most cost of debt methodologies rely on information available from publicly available sources, such as the financial sections of daily newspapers. In contrast, cost of equity methodologies require extensive analyses of data bases that we would have to purchase from vendors or obtain from telephone companies or their representatives. We find no advantages to offset the additional burdens of equity-based triggers such as those suggested by FWA that would use discounted cash flow (DCF) cost of equity estimates for the S&P 400, the RHCs, the 100 large electric utilities or other comparable publicly traded companies. For a similar reason, we find little benefit in using the trigger suggested by SBA based on the capital costs of small companies for which relevant data are not routinely made available to us. Any such trigger would require that we impose a filing burden on small companies at this time. We believe that the better course is to adopt a trigger based on available data while deferring questions regarding the small LECs' actual capital costs until the triggering event occurs.[94] We recognize, however, that a debt-based trigger may not always signal when rate of return represcription proceedings are necessary. For example, cases may emerge where equity returns are much more volatile than debt returns. In these cases, any interested person will be able to petition the Commission to examine whether a represcription proceeding is warranted.

35. The commenters suggest a variety of debt measurements that we could incorporate into our trigger. These debt measurements have many similarities, but there are important differences. Yields on Aa utility bonds and on intermediate and long-term U.S. Treasury securities are dependent on investor expectations regarding capital market movements, and both would allow us to track changes in capital costs. We choose to rely on U.S. Treasury yields, however, because they are easier to track than Aa bond yields. Moreover, as pointed out by GSA, rates on U.S. Treasury securities, unlike yields on Aa utility bonds, do not include a default risk factor and are unlikely to be influenced by financial and regulatory practices that are particular to other public utility industries, such as

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[93] See id. at 34. Debt costs are essentially the fixed interest payments that companies make to bondholders regardless of the level of company earnings. The various interest rates to which a company is subject are readily obtained from the debt instruments. The cost of debt can be directly observed in the market, because the promised amount and timing of the interest payments are fixed. See A. Lawrence Kolbe and James A. Read, Jr. with George Hall, The Cost of Capital 44 (1984). On the other hand, the cost of equity reflects investor expectations regarding future earnings on common stock. These earnings are residual in nature and available only after prior claims on earnings, including interest payments, are met. The methodologies used to estimate the cost of equity attempt to predict these residual earnings, which, of course, cannot be directly observed in advance. See Roger A. Morin, Regulatory Finance: Utilities' Cost of Capital 17, 27 (1994).

[94] See infra Section V.D.

the electric industry.[95] We agree with GSA that the yields on ten-year Treasury securities will tend to reflect fundamental changes in capital markets better than long term bond yields (maturities of 20 to 30 years).[96] Long-term bond yields are influenced too much by expectations of changes in the inflation rate over a prolonged period, and do not give proper weight to more immediate economic factors such as expansions and contractions in the economy.[97] Further, the longer the term of the security, the more uncertain the interest rate pattern. In these circumstances, we conclude that ten-year U. S. Treasury securities provide the proper time horizon for the trigger.

36. Most of the commenters suggest that an evaluation of the need for a represcription should be triggered by a change in yields of 150 basis points. In order to evaluate this suggestion, we ran tests using 100, 150, and 200 basis points to determine the number of times an evaluation would have been triggered during the fifteen-year period starting in 1980 under each of these measures. The tests used twelve different starting dates in 1980, 1981, and 1982 with each test period ending December 31, 1994.[98] We counted the number of times the trigger would have been activated during each test run based on changes in the monthly yields on ten-year U.S. securities of more than the specified amount of basis points for six consecutive months. We measured the change by comparing each month's average yield to the average of monthly yields for the six months preceding the start of the test. We established a new six-month period and calculated a new six-month average each time the trigger was activated during each run. We found that the starting point of the test period influenced how many times the trigger was activated during the test runs: the trigger was activated four to nine times using 100 basis points, four to six times using 150 basis points, and one to three times using 200 basis points. We believe that a measure of 200 basis points, which would have led to only one or two represcription proceedings during

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[95] GSA Reply Comments at 9. There are a number of ratemaking practices that are applied to electric companies, but not telephone companies, that influence the investment market. For example, increasingly, state commissions are requiring electric utilities to phase in the revenue requirement of newly completed plants that would significantly increase the existing rate base. Under these phase-in plans, electric utility rates to consumers are raised gradually over a period of years. These plans are unattractive to the investor, because they delay the cash flow and earnings-quality improvement that the utility would experience under more traditional ratemaking practices. Another problem unique to electric utilities that may affect investor confidence involves the considerable decrease in the rate of demand growth since 1973. Electrical utilities, in the midst of major capacity expansion, have found their existing plant to be adequate. In response, state commissions have imposed severe penalties, disallowing returns on investment in plant that is found to be excess capacity. Robert W. Burke, Utility Bond Analysis, in The Financial Analyst's Handbook 877-78 (Sumner N. Levine ed., 2d ed. 1988).

[96] GSA Comments at 8.

[97] Evelina M. Tainer, Using Economic Indicators To Improve Investment Analysis 7, 12 (1993); Frank J. Jones and Benjamin Wolkowitz, The Determinants of Interest Rates on Fixed-Income Securities, in The Financial Analyst's Handbook 301(Sumner N. Levine ed., 2d ed. 1988).

[98] The starting dates are: January 1, April 1, July 1, and October 1 for 1980, 1981, and 1982.

the fifteen-year period beginning in 1980, is not sensitive enough when one observes the significant fluctuations in yield rates during this period as shown in Chart 1 of Appendix 2. On the other hand, we believe that a measure of 100 basis points would be too erratic based on the wide range of triggering events (four to nine) that would have occurred during the fifteen-year period. Based on our test runs, we conclude that using 150 basis points as the trigger will enable us to begin the process of evaluating the need for represcriptions when circumstances would appear to warrant such an inquiry, but would not be so overly sensitive that minor fluctuations in market behavior would trigger represcription inquiries.

37. We will measure the change of 150 basis points from the average of the monthly average yield on ten-year U.S. Treasury securities for the six months prior to the date of the most recent represcription. This average will serve as the starting point for determining whether a represcription proceeding is warranted. We believe that the six-month average is necessary to minimize possible short-term distortions in the cost of capital and to reflect accurately the current level of ten-year Treasury yields at the time of a new represcription. For this reason, we reject GSA's recommendation that we base a represcription decision on an annual comparison of Treasury yields for the month of August.[99] We agree with NARUC that a bond yield for one month cannot give an accurate reading of the capital markets.[100] Moreover, comparing the rate for the same month year after year would not eliminate seasonal influences.[101]

38. The Notice proposed calculating a moving average of the indicator used to measure change in capital costs.[102] We have decided against using a moving average, because it apparently gives too much weight to past periods in a changing capital market and. thus, may be too slow to identify permanent cost of capital changes. Instead, we will use the monthly average yield amounts in the trigger, without computing a moving average. We recognize that some of these monthly average yields may be subject to the effects of random aberrations that distort them. We believe, however, that requiring the 150 basis point change in monthly average yields to persist for six consecutive months before the Commission acts will filter out the effect of any random aberration on our trigger mechanism.

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[99] GSA Comments at 10.

[100] NARUC Reply at 13.

[101] USTA Reply at 3.

[102] Notice, 7 FCC Rcd at 4691, at para. 23. A moving average is the average of a set number of the most recent values in a series of values. When a new value becomes available, the oldest value is no longer used to compute the average. Each value is given equal weight in computing the average, which means that the oldest value is given the same weight as the more recent values. This may lead to inaccuracies, if the moving average is used to predict the current state of the capital markets because the older values generally are less relevant to determining the current state of these markets.

39. Chart 1 of Appendix 2 depicts the monthly yields on ten-year U.S. Treasury securities from May 1981 to December 1994 and shows when the actual rate of return represcriptions were adopted during that period. Chart 2 depicts the same yield information, but shows when a reassessment of the rate of return would have occurred under our trigger mechanism. A comparison between the two charts indicates that our new trigger would have initiated reassessments at crucial points on the graph where permanent changes in the level of the yields occurred. The first would have occurred in March 1983, when the yields had dropped approximately 260 basis points from the previous prescription. Actually, the Commission did not represcribe a rate of return until August 1986, when the yield rates had dropped an additional 230 basis points. Our trigger would have responded to these major downward movements in yields more quickly.

40. Chart 2 also shows that our new trigger would have been activated in April 1989. The yields, however, decrease after that month, possibly indicating that a new represcription was not warranted. This represents an instance where the semi-automatic nature of our trigger might have come into play. The remaining section of the charts (1990 through 1994) show a significant downward trend and then a quick upswing in yields on ten-year U.S. Treasury securities. Again, these significant swings in yields would have activated our trigger mechanism.

41. Because we have designed the trigger to respond to only persistent changes in the cost of capital, we need not specify any minimum time between represcription proceedings. We will, however, consider the length of time since the last represcription in determining whether to initiate a represcription proceeding. This should prevent the kind of rate and service volatility that might result from frequent represcriptions. Based on the foregoing, we conclude that a 150 basis point change in monthly average yields on 10-year U.S. Treasury yields sustained over a six-month period will produce the best semi-automatic trigger and thus we adopt such a trigger.

42. As shown in Chart 1, the yields on ten-year U.S. Treasury securities for the most recent six months (September 1994 through February 1995) range from a low of 7.46% to high of 7.96%. All of these yields are within 150 basis points of 8.64%, which is the six-month average of yields at the time of our last represcription in September 1990.[103] We, therefore, find that the rate of return prescribed in September 1990 continues to be adequate to attract investment funds in the current capital markets but does not appear likely to yield unreasonably high profits, and we will not issue a notice inquiring into whether a represcription proceeding should be initiated at this time. We, however, are adopting 8.64% as the trigger reference point for determining when our next represcription proceeding may be warranted.

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[103] The Commission adopted the 1990 Represcription Order on September 19, 1990. The average yield for ten-year Treasury securities for the previous six-month period from March 1990 through August 1990 equals 8.64%.

B. Conduct of Represcription Proceedings

1. Overall Procedures

a. Overview

43. In order to allow us to prescribe a rate of return for interstate access services, Part 65 of our rules sets out trial-type procedures for conducting represcriptions that include notices of appearance, initial submissions, responsive submissions, rebuttals, discovery, possible cross-examination, proposed findings of fact and conclusions, reply findings and conclusions, possible oral argument, and use of a separated trial staff at the discretion of the Bureau.[104] In the Notice, we tentatively concluded that this system goes far beyond what is necessary to achieve the goals of our represcription proceedings, and we proposed to replace it with a simpler notice and comment system.[105] Under the proposed system, we would initiate a represcription proceeding through a notice that would include a procedural schedule.[106] We stated our intention that, if we decided in this rulemaking to require participants to file evidentiary information at the start of the proceeding,[107] the notice would set a deadline for submitting it.[108] We tentatively concluded that the subsequent pleading schedule should include comments and replies, and we invited commenters to tell us whether rebuttals would also be necessary.[109] We also tentatively concluded that notices of appearance, proposed findings and conclusions, reply findings and conclusions, and a separated trial staff would be unnecessary.[110] To help focus the proceedings, we proposed to reduce the length of pleadings from 70 to 50 pages for initial comments, from 50 to 35 pages for replies, and (if applicable) from 35 to 25 pages for rebuttals.[111] We sought comment on all these issues.

44. We also proposed to eliminate rules providing for possible oral cross-examination of witnesses[112] and oral argument.[113] To obtain cross-examination under the current rules, a

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[104] We refer to these procedures collectively as a "paper hearing."

[105] Notice, 7 FCC Rcd at 4692, para. 27.

[106] Id. at para. 28.

[107] See infra Section IV.B.3.c.

[108] Notice, 7 FCC Rcd at 4692, para. 29.

[109] Id. at para. 30.

[110] Id.

[111] Id.

[112] 47 C.F.R. §65.104.

party must show that use of written procedures would be prejudicial; that cross-examination is necessary to achieve a full and fair record; that written procedures are inadequate to resolve genuine, substantial, material questions of fact decisively; and that only cross-examination can decisively resolve those questions.[114] To obtain oral argument under those rules, a party must show that oral argument is necessary for a full and fair record; that written argument would be prejudicial; that due and full consideration of all matters of fact and law require oral argument; and that written procedures would not produce the benefits expected from oral argument.[115]

45. In the Notice, we explained that our authority to order cross-examination and oral argument stems from Section 4(j) of the Communications Act[116] and that, among our rules, Part 65 is unique in its attempts to particularize the Commission's statutory mandate to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"[117] by describing circumstances in rulemakings that would warrant use of cross-examination and oral argument. We stated that this particularized treatment implies that rate of return represcription rulemakings are somehow different from other rulemakings.[118] We criticized this implication as incorrect and found that no useful purpose would be served by retaining special rules for cross-examination and oral argument in Part 65.[119] We proposed to eliminate these special rules, but stated that we would retain overall authority to order cross-examination and oral argument in appropriate circumstances. We invited comment on these proposals.[120]

b. Comments

46. There is widespread agreement among the commenters that we can and should simplify our Part 65 represcription procedures, but sharp disagreement over whether notice and comment procedures are an adequate or desirable substitute for paper hearings. Most commenters who address this issue state that the existing procedures are cumbersome and that represcription proceedings, as a result, can be unnecessarily burdensome and costly for

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[113] Id. §65.106.

[114] Id. §65.104.

[115] Id. §65.106.

[116] Id. §154(j).

[117] Id.

[118] Notice, 7 FCC Rcd at 4693, at para. 39.

[119] Id.

[120] Id.

participants.[121]

47. Non-LEC commenters generally embrace notice and comment procedures so long as these procedures provide for discovery.[122] Thus, MCI says that properly structured notice and comment procedures, i.e., those that include full disclosure of relevant information by parties, are an adequate substitute for the current paper hearing regime.[123] MCI states that such procedures would eliminate the need for notices of appearance, proposed findings and conclusions, and a separated trial staff.[124] MCI, however, opposes our suggested reduced page limitations, unless we exempt attachments from the page limits. If attachments are included, MCI proposes 35 or 50 pages for comments, 50 pages for replies, and 35 pages for rebuttals.[125] MCI also argues that we should afford parties ample time within which to analyze the record. MCI suggests that initial comments be due six weeks after the Commission issues a notice commencing the proceeding, with replies due six weeks after the filing of initial comments. Moreover, MCI would have us extend rebuttal rights to all parties because, according to MCI, it is unlikely that only two rounds of pleadings will present all relevant information and parties "must be able to rebut each other's reply comments."[126]

48. GSA agrees that we should replace existing Part 65 paper hearing rules with notice and comment procedures, but says that we must not limit the evidence presented during prescription proceedings.[127] SBA also supports notice and comment procedures because such procedures assertedly would reduce the regulatory costs borne by small LECs.[128] SBA states that initial filings and replies would provide sufficient opportunity for all parties to be heard,[129] but argues that page limitations should not be imposed in

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[121] See FWA Comments at 2; SBA Comments at 9; MCI Comments at 9. See also USTA Comments at 18 (existing Part 65 rules go beyond what is necessary to achieve fair and lawful prescription under the Act, but Notice goes too far in proposing to substitute notice and comment for paper hearing).

[122] See, e.g., FWA Comments at 2-3; GSA Comments at 11; SBA Comments at 9-11.

[123] MCI Comments at 9.

[124] Id. at 9, 22 (Commission must develop substitute for notice of appearance requirement in order to ensure prompt service on all parties).

[125] MCI Comments at 15-16 (lower page limits for initial comments forces LECs to "focus" arguments).

[126] Id. at 14 (complexity of cost of equity issues will require parties in rebuttal comments to develop new responses to other parties' replies). The current rules only contemplate carrier rebuttals. See 47 C.F.R. §65.102(b)(3).

[127] GSA Comments at 11.

[128] SBA Comments at 9.

[129] Id.

rulemakings, including represcription proceedings.[130]

49. While non-LEC commenters generally support notice and comment procedures, LEC commenters and their representatives claim that paper hearings that offer opportunities for reasonable discovery represent the minimum procedure that comports with due process, and are otherwise necessary in order for the Commission and affected LECs to compile a complete record for decision-making.[131] According to Rochester and USTA, Section 205(a) of the Communications Act,[132] the Administrative Procedure Act ("APA"), and relevant case law mandate paper hearings,[133] and require more than notice and comment if represcription proceedings are to provide a "full opportunity to be heard."[134] Moreover, Rochester and USTA argue that, in cases where the Commission proposes to decrease the prescribed rate of return, the Commission assumes the burden of proof. Rochester and USTA contend that adopting an automatic trigger and conducting a subsequent proceeding according to notice and comment procedures would unlawfully shift the burden of proof away from the proponent (i.e., the Commission) to the LECs.[135] Even if the Commission were to conclude that notice and comment procedures satisfy legal requirements for ratemaking procedures, Rochester and USTA maintain that the Commission still should conclude that such procedures are ill-suited for highly fact-specific, adversarial-type inquiries like represcription proceedings.[136]

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[130] Id. at 9-10.

[131] Rochester Comments at 5-8; USTA Comments at 7-8. See also, e.g., Alltel Comments at 2; BellSouth Comments at 1; Lexington Comments at 1-2; SNET Comments at 1-2; United Comments at 9-10. But see Centel Comments at 7 (urging notice and comment proceedings providing, inter alia, for initial comments, replies and rebuttals and urging strict limits on discovery, cross-examination, and oral argument if the Commission retains paper hearings).

[132] 47 U.S.C. §205.

[133] Rochester Comments at 8-10, citing Mobil Oil Corporation v. FPC, 483 F.2d 1238, 1262-63 (D.C. Cir 1973); USTA Comments at 11-16. Rochester maintains that although the APA defines ratemaking as rulemaking, ratemaking represents a special exception to the general APA rule that notice and comment proceedings are appropriate for rulemakings. Rochester Comments at 8-9.

[134] Rochester Comments at 5-8; USTA Comments at 7-8. See also United Comments at 10 (supports USTA's legal analysis).

[135] Rochester Comments at 10-11; USTA Comments at 9-10 (Bureau as proponent becomes a party to the represcription proceeding and other parties have discovery rights in order to evaluate data and information upon which Bureau bases its position); See also BellSouth Comments at 1-2 (Commission proposals to expand role of Bureau information requests and eliminate separated trial staff are inconsistent; active role of Bureau, as party, necessitates creation of separated trial staff to manage non-party discovery); United Comments at 10.

[136] Rochester Comments at 11-12 (individuals under oath likelier to be accurate; adversarial proceedings more appropriate for highly fact-based inquiries); USTA Comments at 12 (importance of cost of capital issues to LECs necessitates discovery and opportunity to examine experts on contested factual issues; notice and comment

50. Nevertheless, Rochester and USTA agree that the existing paper hearing procedures can be simplified. They urge us to retain paper hearings while streamlining the procedures and removing unnecessary rule sections.[137] Rochester and USTA say that the Commission should allow parties to file direct cases, rebuttal cases and responsive cases within appropriate page limits and timeframes.[138] Rochester asserts that the direct cases should contain all the supporting materials and proposed findings that the proponent thinks support its rate of return recommendation.[139] Rochester proposes that other participants, including non-carriers, be able to participate by filing responsive cases that would be served on all parties filing direct cases.[140] Under this system, parties thereafter would file rebuttal cases within a time frame similar to that established for responsive cases.[141] Rochester notes that its proposed procedures, including its proposals for discovery,[142] should eliminate the need for a separated trial staff, mandatory proposed findings and conclusions, cross-examination, and oral argument.[143] USTA agrees, and argues that considerations of fairness and sound decision making argue for retaining opportunities for a separated trial staff, cross-examination and oral argument, even if we eliminate such specific provisions from Part 65.[144]

c. Discussion

51. Based on our review of the record, we conclude that the public interest would be better served by streamlining our existing paper hearing procedures, than by adopting the simpler notice and comment regime that we proposed in the Notice. We based our proposal

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procedures invite conclusory pleadings, rather than rigorous and well-supported argument).

[137] Rochester Comments at 7-21 (streamlined procedures with curtailed discovery allow elimination of separated trial staff, proposed findings, reply findings, cross-examination and oral argument); USTA Comments at 18-31 (argues for streamlined discovery procedures, while retaining opportunities for additional discovery, cross-examination and oral argument).

[138] Rochester Comments at 17-18 (supporting page limits for direct cases and responsive cases as proposed in Notice for comments and reply comments; supporting associated timeframes proposed in Notice, plus rebuttals within timeframe similar to that proposed for reply comments); USTA Comments at 19-20 (central feature of paper hearing -- direct case, responsive case, and rebuttal -- should be retained; page limitations can be reduced more than proposed in Notice).

[139] Rochester Comments at 17-18.

[140] Id. at 18.

[141] Rochester Comments at 19; USTA Comments at 26.

[142] See infra Section IV.B.

[143] Rochester Comments at 21 (separated trial staff must be retained if Commission acts as party as well as decision maker; cross examination and oral argument available on discretionary basis).

[144] USTA Comments at 16.

to substitute simpler notice and comment procedures for existing paper hearing procedures in future represcription proceedings on our experiences in the 1990 represcription proceeding. At that time, we found that the Part 65 procedures go far beyond what is necessary to achieve the goals of our represcription proceedings.[145] We recognized that the discovery rules, which require a Bureau ruling prior to any involuntary discovery, were a cause of significant delay.[146] We are convinced that we should simplify our represcription procedures in order to eliminate unnecessary pleadings and delays and the attendant costs they impose on parties to represcription proceedings. Although almost all parties to this proceeding support some form of simplification, they emphasize that represcription proceedings are adversarial in nature and depend upon a thorough fact-based inquiry that develops a great amount of probative evidence. In recognition of this, even the parties who support simpler notice and comment procedures urge us to continue to promulgate rules that allow for, among other procedures, rebuttal pleadings and significant discovery, including interrogatories.[147] Such additions would, however, unduly complicate a notice and comment system, whose virtue is its simplicity in comparison to a paper hearing.

52. As a result, it is not clear what we would gain by abandoning paper hearing procedures, especially if one predictable result would be the filing of a large number of petitions requesting leave to file extraordinary pleadings and to engage in discovery. We find that the better approach is to revise our paper hearing procedures to provide for sufficient pleading opportunities to develop a full record and enough automatic disclosure of factual information to minimize procedural delay. Accordingly, we will retain current rule provisions that allow for the filing of direct, responsive, and rebuttal cases, and we will retain the time frames currently in place to govern the timing of the responses and rebuttals.[148] Thus, initial submissions (direct cases) will be limited to 70 pages and due sixty days following the release of the notice initiating a represcription proceeding. Responses will be limited to 70 pages and due 35 calendar days following the deadline for filing initial submissions. We agree with MCI that all parties should have rebuttal opportunity. Rebuttals will be limited to 50 pages and due 21 days after the deadline for filing responses. These procedures, in combination with the provisions we make for automatic disclosure and discovery,[149] should provide parties to future represcription proceedings with ample opportunities to examine and contest the submissions of other parties. We find that the revised procedures will further our goal of simplifying those proceedings while ensuring the

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[145] Notice, 7 FCC Rcd at 4692, para. 27.

[146] Id. at para. 33.

[147] See, e.g., MCI Comments at 9-10, 20-21.

[148] Because we replace the biennial represcription cycle with a semi-automatic trigger, see Section IV.A, infra, we eliminate Section 65.102(c)(1) of our rules, 47 C.F.R. §65.102(c)(1), which requires that initial submissions be filed on January 3 of each even numbered year.

[149] See infra Section IV.B.3.

development of a full and complete record during their course.

53. In view of the above, we eliminate Sections 65.104 ("Oral cross-examination of witnesses"), 65.105 ("Proposed findings of fact and conclusions"), and 65.106 ("Oral Argument") of our rules. As many commenters assert, these rules are not necessary to ensure the proper development of record evidence. In particular, proposed findings and conclusions and reply findings and conclusions burden parties without improving the decisional process. On the other hand, some commenters request that we affirm that we will entertain petitions for oral cross-examination and oral argument.[150] We do so declare, but caution that such petitions will need to show extraordinary circumstances and ordinarily will not be granted.

54. We also revise Section 65.100 ("Participation and notice of appearance") to eliminate required notices of appearance. Henceforth, interested persons may become parties to a represcription proceedings by filing pleadings in them. This procedure is similar to our procedure for other rulemaking proceedings.

55. We find that these streamlined paper hearing procedures satisfy statutory and constitutional due process requirements. We note that our decision not to adopt the notice and comment procedures we proposed does not result from a conclusion that we may not lawfully use simple notice and comment procedures to represcribe the rate of return authorized for LEC interstate access services. Both USTA and Rochester concede that Section 553 of the APA,[151] the statute that generally defines what administrative procedures are required of federal agencies, does not require trial-type hearings in ratemakings.[152] Only if an agency's enabling statute requires that rules "be made on the record after opportunity for an agency hearing" does Section 553 mandate trial-type procedures in addition to, or instead of, notice and comment procedures.[153]

56. We prescribe interstate rates of return for telephone companies pursuant to Section 205(a) of the Communications Act. The relevant inquiry, therefore, settles on whether that section, which allows the Commission to prescribe rates after "full opportunity for hearing," mandates that represcription proceedings include procedures in addition to those we adopt in this Order. Considering a similar statute, the Supreme Court held that the Interstate Commerce Commission ("ICC") did not have to employ trial-type procedures to develop rules addressing a nationwide shortage of railroad cars because the relevant statutory language (i.e., ratemaking "after hearing") did not require that rules be made "on the

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[150] See, e.g., Centel Comments at 7-8.

[151] 5 U.S.C. §553.

[152] See, e.g., USTA Comments at 13.

[153] See 5 U.S.C. §553(c) (trial-type procedures in 5 U.S.C. §§556 & 557 apply where enabling statute requires that rules be made "on the record after opportunity for an agency hearing").

record."[154] Thereafter, in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,[155] the Court determined that notice and comment procedures are legally sufficient in rulemaking proceedings unless the agency's enabling statute requires that the rulemaking be conducted "on the record."[156] Finally, in AT&T v. FCC,[157] the United States Court of Appeals for the Second Circuit found that, because Section 205(a) does not include the words "on the record," it could not be construed to require trial-type procedures.[158]

57. These cases make clear that simple notice and comment procedures are sufficient for represcribing the rate of return authorized for LEC interstate access services. Because the streamlined paper hearing system we adopt in this Order includes procedures in addition to simple notice and comment, we conclude that this system is also sufficient to represcribe that rate of return. We will revisit our decision not to adopt simpler notice and comment procedures if our experience with our revised paper hearing procedures proves unsatisfactory.

2. Participation

a. Overview

58. Part 65 requires certain LEC holding companies, namely the RHC offspring of the former Bell System, to participate in represcription proceedings because at the time we adopted Part 65 we applied rate of return regulation to the RHCs' operating companies.[159] Because the BOCs are now regulated under price caps, the Notice questioned whether we should continue to rely on the RHCs as primary information sources in represcription proceedings.[160] We specifically asked whether we should continue to obtain needed data from the RHCs if these companies, now regulated under our price cap rules, face risks different from those rate of return-regulated LECs face in the provision of interstate access

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[154] Id. See also United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973) (statute's "after hearing" requirement was not equivalent to language that would require trial-type procedures).

[155] 435 U.S. 519 (1978).

[156] Id.

[157] 572 F.2d 17 (2d Cir. 1978).

[158] Id.

[159] See 47 C.F.R. §§65.1(a), 65.200. We originally limited required participants to these large companies because our comparable firms analysis was based on those firms listed on the New York Stock Exchange. We did not include other stock exchanges in the comparable firms analysis because we concluded that this would needlessly add to the costs of analysis in represcription proceedings. See Phase II Order, supra, at para. 47.

[160] Notice, 7 FCC Rcd at 4694, para.41.

service.[161] We asked commenters to suggest alternative information sources, and suggested that, even if we continue to rely on RHC data, such data might be collected and submitted by a LEC organization such as the National Exchange Carrier Association, Inc. ("NECA"), rather than by the RHCs.[162] Accordingly, we proposed to make NECA the only mandatory participant in future represcription proceedings and to require it to collect and process any information needed to support our triggering and cost of capital methodologies.[163] We invited comment on what this might cost NECA and on whether we should require NECA to classify its participation costs as Category I expenses.[164]

b. Comments

59. A few commenters would have us continue to rely on RHC data, contending that circumstances have not changed significantly since the 1990 represcription proceeding in which we relied on such data,[165] or that RHC returns on assets and shareholder equity, and debt-to-equity ratios compare closely to historical composite data of USTA members.[166] Even some of these commenters state that RHC data will need to be adjusted to take into account the different risk characteristics faced by the smaller LECs.[167] Most commenters, however, urge us to cease relying on RHC data, arguing that the risk characteristics of the RHCs in providing interstate access service no longer track those of the smaller LECs, and, accordingly, that it would be better to obtain data from sources that reflect similar risk characteristics. [168]

60. Most of these commenters urge us to use BOC data as a new surrogate data source.[169] There is little support even among these commenters, however, for requiring BOC participation in represcription proceedings. Instead, these commenters state that we can

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[161] Id.

[162] Id.

[163] Id.

[164] Id. at para. 42. Section 69.603(h) of our rules, 47 C.F.R. §69.603(h), requires NECA to classify its costs as either Category I, which are included in interstate revenue requirement and revenue distribution computations, or Category II, which are excluded from those computations.

[165] NTCA Comments at 4.

[166] Frederick and Warriner Comments at 3.

[167] See Centel Comments at 8-9. See also FWA Comments at 6.

[168] See, e.g., FWA Comments at 6; Rochester Comments at 24-27.

[169] See, e.g., Delhi Comments at 1-2; Kaleva Comments at 1-2; Nebraska Central Comments at 1-3; OPASTCO Comments at 3.

easily obtain any necessary data from materials on public file with the Commission, including Automated Reporting Management Information System ("ARMIS") reports.[170] SBA asserts that BOC participation is unnecessary given that these carriers are now regulated under price caps.[171] The BOCs agree, and point out that the Notice specifically stated that its proposals would apply only to those LECs not subject to price cap regulation.[172] US West, for example, claims that we should reaffirm that those proposals do not apply to price cap LECs.[173] US West contends that otherwise our actions in this rulemaking will affect the parameters of the sharing obligations currently imposed on price cap LECS as well as our LEC price cap performance review.[174]

61. GSA, in contrast, would require the participation of the RHCs or BOCs because, in GSA's view, even carriers now subject to price cap regulation would be directly affected by a change in the authorized rate of return. This is so, according to GSA, because the price cap mechanism imposed on the LECs includes a sharing mechanism that is, in part, calibrated to the rate of return otherwise used to initialize price cap carrier rates. Thus, GSA argues that changes in the authorized rate of return should automatically affect the sharing requirements for price cap LECs.[175] Ameritech, in reply, says that parties like GSA misunderstand the nature of our LEC price cap system. According to Ameritech, that system does not contemplate sharing zone adjustments, such as would occur under GSA's interpretation, every time the Commission represcribes the rate of return.[176]

62. Several commenters support allowing NECA to collect needed information, and some oppose that approach. SBA argues that we should compel NECA to participate in represcription proceedings because NECA has the resources to gather and process the

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[170] See, e.g. Community Service Comments at 1-2. Since the Notice was released, we revised the Annual Report Form M ("Form M") and incorporated it into our ARMIS system. ARMIS is an automated system consisting of ten reports containing financial and statistical data the we use to administer our accounting, joint cost, jurisdictional separations, rate base, and access charge rules. LECs with annual revenues of $100 million or more must file ARMIS reports. ARMIS Report 43-02 contains LEC financial information, and ARMIS Report 43-08 contains LEC statistical information. See Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies and Annual Report Form M, Memorandum Opinion and Order, 8 FCC Rcd 2535 (1993). To avoid confusion, this Order refers to ARMIS rather than to the now obsolete, Form M.

[171] Id.

[172] See, e.g., US West Comments at 1-2.

[173] Id.

[174] Id.

[175] GSA Comments at 2-4. See also MCI Comments at 23.

[176] Ameritech Reply at 2-5. Accord BellSouth Reply at 4 (GSA analysis would "convert price cap regulation into a banded rate of return mechanism with a price cap overlay"); NYNEX Reply at 1-3; Pacific Reply at 2-4.

information necessary to develop a rate of return.[177] NECA itself agrees to serve as information gatherer and processor, but only if the Commission authorizes it to recover the associated costs in an appropriate manner.[178] NECA notes, however, that it does not ordinarily collect the information needed for a represcription proceeding from its members. Accordingly, NECA states that if it were given data gathering and processing responsibilities, it would need to rely on publicly available data or data from commercial sources.[179] FWA, however, opposes NECA's participation because, in its view, NECA's involvement as information gatherer is unnecessary.[180]

c. Discussion

63. As discussed more fully in Section V, infra, we agree with those commenters who argue that, because the RHCs no longer face risks comparable to those faced by carriers subject to rate of return regulation, RHC data may no longer serve as the best data upon which to base a uniform rate of return prescription. Accordingly, it would be inappropriate to require the participation of the RHCs in future represcription proceedings absent other compelling factors. The only compelling factor raised in the comments is the impact of a rate of return represcription on price cap LECs. Under our present rules, that impact arises in only limited areas. These include possible changes in the amounts that price cap LECs receive from the Universal Service Fund or pay for long-term support of NECA's common line pool;[181] possible changes in price cap LECs' accounting for those affiliate transactions that our rules require LECs to record at costs;[182] and possible changes to the amounts those LECs pay the Telecommunications Relay Services Fund to give hearing-impaired users full access to the voice telecommunications network.[183]

64. The question of what, if any, additional impact future rate of return represcriptions will have on price cap LECs is not before us here. As we indicated in the

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[177] SBA Comments at 11 (NECA's participation should lower participation costs of small LECs).

[178] MCI Comments at 23; NECA Comments at 5-6 (costs would not be significant and should be recovered as Category I expenses).

[179] NECA Reply at 15.

[180] FWA Comments at 7 (Commission should gather necessary information directly from industry if necessary).

[181] Both of these programs distribute interstate revenue based on the prescribed interstate rate of return. See 47 C.F.R. §§ 36.601-36.631, 69.607-69.612.

[182] See Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and Their Nonregulated Affiliates, Notice of Proposed Rulemaking, CC Docket No. 93-251, 8 FCC Rcd 8071, 8095-96, para. 66 (1993).

[183] See 47 C.F.R. § 64.604.

Notice, the scope of this proceeding is limited to those LECs who remain subject to rate of return regulation.[184] Moreover, we elect not to require NECA or any other interested person -- including the BOCs -- to participate in represcription proceedings at this time. We agree with those commenters who point out that much relevant data -- whether BOC specific, large carrier specific, or small carrier specific -- is generally available and publicly filed with this Commission. Any additional data needed during a represcription proceeding can be obtained though discovery or Bureau information requests.

3. Discovery

a. Overview

65. Section 65.103(a) of our rules currently permits written interrogatories and document requests directed to rate of return submissions and "upon any matter, not privileged, that will demonstrably lead to the production of material, relevant, decisionally significant evidence."[185] Discovery requests are due within fourteen days after the filing of the submission to which they relate; oppositions are due seven days thereafter.[186] In the Notice, we found, based on our experience in the 1990 represcription proceeding, that these discovery provisions had been a qualified success.[187] Although we concluded that discovery had contributed to a full and fair record in that proceeding, we also found that it entailed considerable effort on the part of the Commission. Most of this effort was required because the current rules provide little guidance on what is discoverable and because those rules require the Bureau to rule on discovery requests prior to any involuntary discovery.[188] We tentatively concluded that we could streamline discovery without jeopardizing the development of a full and fair record.[189]

66. We proposed a number of specific changes to our discovery rules. First, we proposed to require the automatic disclosure of much, if not all, of the information usually obtained through discovery. We proposed that parties should automatically file studies, financial analysts' reports, and other documents that parties' experts rely upon in preparing their presentations.[190] Second, we asked whether we should expand the role of Bureau

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[184] Notice, 7 FCC Rcd at 4688-89, paras. 1-9.

[185] 47 C.F.R. §65.103(a).

[186] Id.

[187] Notice, 7 FCC Rcd at 4692, para. 33.

[188] Id.

[189] Id. at para. 34.

[190] Id.

information requests.[191] The current rules authorize the Bureau to require represcription proceeding participants to submit data or studies that are "reasonably calculated to lead to the development of a full and fair record."[192] Third, we proposed to eliminate written interrogatories even if we retained other types of discovery.[193] We stated that represcription proceedings depend significantly on expert economic analysis, but that interrogatories often add little more to the record than multiple reiterations of the parties' positions.[194]

67. Finally, we asked parties to comment generally on how discovery should proceed if it were retained.[195] We stated that we saw no reason to change the current rule that involuntary discovery requires prior Bureau rulings so long as we further streamlined discovery itself, as proposed in the Notice.[196] If these proposals were adopted, we reasoned, there would be fewer discovery requests because most decisionally significant information would be automatically made available to all parties during the proceeding. We indicated that prior Bureau review of discovery requests, under these circumstances, might serve our goal of reducing the burdens of the represcription process.[197] If the current discovery rules were retained, however, we proposed to facilitate discovery by requiring parties to comply with discovery requests unless they first obtained protective orders.[198] We asked commenters to address this proposal and invited alternative proposals that might reduce discovery burdens.[199] We also asked commenters to address what schedule we should employ if we were to adopt a notice and comment procedure that allows for discovery.[200]

b. Comments

68. Most commenters on discovery matters agree that our discovery procedures can be simplified, but all urge us to affirm that adequate discovery is essential to highly adversarial proceedings like rate of return represcription proceedings. Thus, Rochester and

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[191] Id. at para. 35.

[192] 47 C.F.R. §65.102(a).

[193] Notice, 7 FCC Rcd at 4693, para. 36.

[194] Id.

[195] Id. at para. 37.

[196] Id.

[197] Id.

[198] Id.

[199] Id.

[200] Id.

USTA would initially curtail discovery by substituting a certain amount of self-executing disclosure for the current system.[201] Rochester and USTA would have us require parties to produce workpapers and related background documents, upon request, for the Commission and other parties within ten days of the filing of related pleadings.[202] According to Rochester, this type of self-executing discovery should virtually eliminate the need for interrogatories, but the Commission should recognize that interrogatories can still be necessary or, at least, useful as a device to test factual presentations.[203] Rochester maintains that the Commission should allow fact-based interrogatories under specified circumstances and according to a schedule that we could include in the notice commencing the represcription proceeding.[204] Rochester and USTA argue that the Commission should not substitute Bureau data requests for discovery because such requests may not satisfy the needs of all parties.[205]

69. MCI argues that the Commission's rules should recognize that represcription proceedings are highly adversarial and include disputes over controversial issues like the cost of equity. MCI asserts that this means that pleadings in represcription proceedings resemble adjudicatory briefs, and the Commission's rules must afford participants ample opportunity to develop and argue the record.[206] Accordingly, MCI says that the Commission should require significant automatic disclosure[207] and encourage Bureau information requests.[208] MCI also

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[201] Rochester Comments at 19; USTA Comments at 26 (opportunity for additional discovery should be available in context of filing of direct and responsive cases).

[202] Rochester Comments at 19-20 (materials produced upon request of party within ten days of filing of direct case, responsive case or rebuttal case, as appropriate); USTA Comments at 28-29 (automatic service of materials on all parties would be wasteful; materials should be produced upon request of party within ten days of filing or upon request of the Commission at any time).

[203] Rochester Comments at 20.

[204] Id. See also USTA Comments at 30 (Part 65 rules need not specifically provide for interrogatories, but interrogatories should be available for good cause shown).

[205] Rochester Comments at 19 & 21; USTA Comments at 31. See also BellSouth Comments at 2.

[206] Id. at 10.

[207] Id. at 17-19 (automatic disclosure of all financial analysts' reports and other data upon which a party relies in its comments, reply comments, or rebuttals at the time such pleadings are filed; includes all raw data and statistical analyses in hard copy and machine-readable form; statistical analyses of data must be supported by sufficiently large data universe to allow critical evaluation of criteria used to support analyses).

[208] Id. at 20-21 (Bureau information requests as supplement to discovery by parties; information requests should be used to obtain unforeseen categories of data going beyond data automatically filed; Bureau should allow parties to request that it obtain particular data and information pursuant to bureau information requests).

contends that the Commission should permit discovery, including interrogatories.[209]

70. GSA also would require automatic discovery of certain information at the beginning of a represcription proceeding, including: (1) RHC DCF calculations using Institutional Brokers Estimate Service ("IBES") growth estimates; (2) S&P 400 DCF calculations by quartile; (3) Utility and Treasury bond yields; and (4) recent state commission rate of return findings.[210] Such automatic discovery should also include studies, financial analysts' reports and other documents relied upon by experts, according to GSA, since this would reduce overall discovery burdens.[211]

c. Discussion

71. We agree with those commenters who argue we can largely eliminate the costs and delays attendant to represcription proceedings if we require that parties automatically file all studies, financial analysts' reports, and other documents relied upon to prepare their direct, reply and responsive cases. Accordingly, we will revise our rules to direct parties to file such information with the Commission at the time they file their direct, reply and responsive cases.[212] Generally, we expect that interested persons and parties will obtain copies of the filed pleadings and other information, including information available through automatic discovery, from the Commission's duplicating contractor. However, we will also order parties to serve copies on those parties who request direct service.[213] Because information technology and our ability to use it change constantly, we do not at this time specify the format (e.g., hard copy, machine readable) parties should employ to file pleadings and information with the Commission and with parties requesting direct service. Instead, we will address such matters in the notice initiating a represcription proceeding.

72. Given mandated, "automatic" discovery of the material described above, we largely retain our current rules governing written interrogatories and document requests. Although we believe that automatic disclosure will greatly reduce the need for these discovery methods, we are persuaded by the commenters that additional discovery methods including interrogatories, should be available to "capture" any material, relevant, and

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[209] Id. at 21-22 (unless opposed, discovery requests should be answered without Bureau order; answers or objections should be filed within 2 weeks after discovery requests are served; where Bureau grants contested discovery, opponent should file answer within 1 week of Bureau order; all discovery requests must be filed with Commission to ensure that record is complete, i.e., even after close of rebuttal filings; discovery responses should be made available to all parties to a represcription proceeding).

[210] Id. at 11-12 (enumerated information should be centrally filed).

[211] Id.

[212] See Appendix 4, 47 C.F.R. § 65.105(a).

[213] See Appendix 4, 47 C.F.R. §§ 65.100(b), 65.105(a).

decisionally significant evidence not otherwise submitted. Because such additional discovery will be extraordinary, we do not believe that the need for the Bureau to act on discovery requests will unduly slow the represcription process. We will, however, make clear that parties must honor unopposed additional discovery requests within 14 days.[214] We need not, at this time, decide whether parties should automatically file with the Commission all materials that are the subject of additional discovery requests and, thus, make the materials available to all parties in a represcription proceeding. Predictably, in some cases, this would necessitate taking steps to protect confidential information by such means as protective orders. We will address these issues as the need arises once a represcription proceeding is initiated. Finally, we will continue to allow for Bureau information requests.[215] Nevertheless, while we view such Bureau requests as a valuable tool in developing a full record for Commission decision making, we are not persuaded that they should substitute for discovery as was proposed in the Notice.

4. Requests for Individualized Rates of Return

73. In the Notice, we proposed to retain Sections 65.101 and 65.102(c)(2),[216] which provide a mechanism for LECs to seek individualized rates of return.[217] These rules allow a carrier to avoid the prescribed unitary rate of return by showing that, in its case, the prescribed cost of capital is "so low as to be confiscatory because it is outside the zone of reasonableness for the individual carrier's required rate of return for exchange services."[218] To make its case, the carrier must show exceptional facts and circumstances that are not transitory and that would justify individualized treatment for at least two years.[219] The rules contemplate that carriers ordinarily will file requests for individualized treatment at the time participants file responsive pleadings in rate of return represcription proceedings, although carriers may file petitions at any time.[220] If a carrier files a petition at a time other than the date for filing responsive pleadings, the rules require the petitioner to show "that the fluctuation in earnings requirements is not the result of short term fluctuations in the cost of capital or similar events."[221] In the Notice, we requested comment on how we might modify

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[214] See Appendix 4, 47 C.F.R. § 65.105(c).

[215] See Appendix 4, 47 C.F.R. § 65.103(a).

[216] 47 C.F.R. §§65.101, 65.102.

[217] Notice, 7 FCC Rcd at 4694, para. 43.

[218] 47 C.F.R. §65.101(a).

[219] Id. §101(b).

[220] See id. §§65.101(b), 65.102(c)(2).

[221] Id. §65.101(b).

these requirements to conform them to any new procedures adopted in this proceeding.[222]

74. All commenters who addressed the issue agree that we must make available to qualifying carriers procedures to enable them to obtain an individualized rate of return prescription upon a proper showing. These commenters agree, however, that we should grant individualized treatment only if a petitioning carrier shows unique and persisting circumstances.[223] Accordingly, we believe we should retain the requirements of Section 65.101 governing LECs who wish to obtain individualized rates of return. The current rule requires carriers seeking individualized rates of return to justify a prescription for a two-year period. Although this latter proviso was intended to accommodate the biennial represcription cycle that this Order abandons,[224] we are convinced that individualized prescriptions must be limited to require regular demonstrations that cost of capital variances sufficient to warrant the individual prescription continue.

75. In addition, in a subsequent portion of this Order, we eliminate the current requirement for carriers in group represcription proceedings to file comparable firms analyses.[225] Consistent with that action, we also eliminate the requirement for such analyses from the individualized rate of return rule. With this exception, we retain all current elements of the showing required by LECs to justify an individualized rate of return.

V. Cost of Capital Methodologies

A. Overview

76. The LECs' cost of capital is the rate of return they must earn to attract investment funds. By judicial standards, each LEC must receive the opportunity to earn a rate of return "commensurate with returns on investments in other enterprises having corresponding risks" and "sufficient to assure confidence in the financial integrity of the enterprise, as to maintain its credit and to attract capital."[226] On the other hand, the countervailing interests of the ratepayers require that "the return should not be higher than

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[222] Notice, 7 FCC Rcd at 4694, para. 44.

[223] FWA Comments at 7 (carriers should be allowed to show that exceptional facts and circumstances that will persist for at least two to three years justify an individualized rate of return); Frederick and Warinner Comments at 2 (carriers must show exceptional facts and circumstances to obtain individual prescription); USTA Comments at 24-25 (current rules governing exceptional treatment can be eliminated, but Commission must make some provision for carriers to obtain individual treatment).

[224] See infra Section IV.A.

[225] Compare infra Section V.C.3 with 47 C.F.R. §65.101(a).

[226] FPC v. Hope Natural Gas, 320 U.S. at 603.

necessary for this purpose..., because otherwise ratepayers would pay excessive prices that regulation is intended to prevent."[227] In represcription proceedings, we use estimates of the cost of capital for LEC interstate access services to determine a zone of reasonableness that is narrower than the zone defined by these standards,[228] and we use this narrower zone to prescribe a unitary, overall rate of return for rate of return LECs.[229] The LECs' actual, future rates of return may differ from the prescribed rate.

77. Part 65 of our rules sets forth three basic approaches for estimating the cost of capital for LEC interstate access services. The first approach uses the rates of return authorized for the BOCs' intrastate operations in each state where a BOC is the principal exchange carrier.[230] The second uses a composite of the RHCs' weighted average costs of capital.[231] The third uses a composite of the weighted average costs of capital of firms deemed comparable to providers of interstate access services. The rules specify various screens for selecting comparable firms.[232]

78. Part 65 requires the RHCs to file the state rate of return and RHC cost of capital information at the start of each represcription proceeding.[233] The rules set forth complicated methodologies for computing the RHCs' and the comparable firms' costs of capital. These methodologies require the computation of a weighted average cost of capital for each RHC and comparable firm based on its outstanding long-term debt, equity, and, where applicable, preferred stock, and the proportion of each in its capital structure.[234] The rules contemplate that, in represcription proceedings, we will utilize our best judgement in determining the weight, if any, to be accorded to the estimates these basic approaches produce. Parties to represcription proceedings may urge, and the Commission may adopt, cost of capital methodologies other than those specified in the rules.[235]

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[227] United States v. FCC, 707 F.2d 610, 612 (D.C. Cir. 1983).

[228] 1990 Represcription Order, 5 FCC Rcd at 7540, n.314.

[229] This rate of return is used to determine each rate of return LEC's revenue requirements, in accordance with the formula set forth in para. 7 of this Order.

[230] 47 C.F.R. §65.201(a).

[231] Id. §§65.201(b), 65.300-65.304.

[232] Id. §65.400.

[233] Id. §65.201.

[234] Id. §§65.300-65.304.

[235] See 84-800 Phase II Order, 51 Fed. Reg. at 1800.

B. Proposed Changes

79. In the Notice, we stated that we would continue to use a weighted average cost of capital calculation to estimate the cost of capital for LEC interstate access service.[236] We proposed, however, to reduce the burden of future represcription proceedings by using simplified methodologies to determine the components of the weighted average cost of capital calculation. We, therefore, invited comment on alternative, streamlined methodologies for determining the cost of equity, the cost of debt, the cost of preferred stock, and the proportion of each in the capital structure.[237]

80. We also invited comment on the role that methodologies specified in the rules should play in future represcription proceedings. For the cost of equity component, we proposed to retain our policy of determining the weight to be accorded any methodology at the point we represcribe the authorized interstate rate of return. For the non-equity components, we proposed to make methodologies specified in the rules either presumptive or conclusive in future represcription proceedings. We explained that a presumptive methodology would be used in future represcription proceedings, unless the record were to show that it would produce unreasonable results.[238]

C. Cost of Equity

1. Overview

81. The cost of equity relates to the sale of common stock to finance LEC interstate access services. Part 65 prescribes a "historical" discounted cash flow (DCF) methodology to compute this cost. The rules calculate the cost equity as:

D/P + G, where:

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[236] This calculation can be expressed as:

$$C = [\langle D/(T) \rangle \times i] + [\langle P/(T) \rangle \times p] + [\langle E/(T) \rangle \times e]$$

where C is the weighted cost of capital;
D is the book value of the debt;
P is the book value of the preferred stock;
E is the book value of the common stock;
T is equal to E + D + P;
i is the cost of debt;
p is the cost of preferred stock; and
e is the cost of equity.

[237] Notice, 7 FCC Rcd at 4694-700, paras. 45-87.

[238] Id. at 4694, para. 47.

D is the estimated annual dividend on a share of common stock,

P is the price of a share of common stock, and

G is the estimated long-term growth rate of dividends.[239]

Under this methodology, the cost of using common stock to finance operations can be equated with the sum of the expected dividend yield on common stock plus the expected growth rate of future dividends.

82. The rules require the RHCs to submit data reflecting two variations of the DCF methodology. Both variations use the average share price over a two-year period preceding a represcription filing for P, and the average dividend paid during that two-year period for D. The first, or G1, variation uses the growth in dividends that actually occurred during the same two-year period to determine the dividend growth factor. The second, or G2, method averages analysts' growth forecasts for the firms as reported by IBES[240] over that same period. The forecasts in each report are averaged, through use of the median, to derive a composite forecast.[241]

83. In the Notice, we proposed numerous changes in the way cost of equity is calculated. These proposals concerned "historical" DCF, "classical" DCF, stock prices, dividends, growth in dividends, quarterly compounding,[242] flotation costs,[243] and risk premium analyses.[244] We also described a variant of risk premium analysis called the capital asset pricing model ("CAPM"), which, in contrast to other risk premium methods. derives a risk premium for each company by using the variance of the company's stock price relative to the stock market as a whole.[245]

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[239] 47 C.F.R. §65.303. This methodology is "historical" because it relies on past growth. In contrast, classical DCF methodologies rely on forecasts of future growth.

[240] IBES is the Institutional Brokers Estimation Service. It presently publishes, on a monthly basis, institutional analysts' forecasts of the five-year rate of growth of earnings for listed stocks.

[241] 47 C.F.R. §§65.303-65.304.

[242] Quarterly compounding refers to an adjustment to the DCF formula to account for the payment of dividends on a quarterly, rather than annual, basis.

[243] Flotation costs refer to the temporary reduction in the market value of a stock caused by the issuance of additional shares of that stock.

[244] Notice, 7 FCC Rcd at 4695-98, paras. 54-75. Risk premium analyses estimate the cost of equity by adding a risk premium to the current yield on a relatively "risk-free" investment, such as long-term United States Treasury bonds.

[245] Id. at 4697, paras. 68-69.

2. Comments

84. The commenters generally oppose codifying a cost of equity methodology in the rules.[246] Small LECs believe a codified methodology would restrict the Commission's flexibility, complicate future represcription proceedings, and contradict the Commission's simplification objectives.[247] Others contend that the cost of equity is not directly observable.[248] They maintain that estimating the cost of equity continues to require judgment and sophisticated analysis.[249] Given the dynamic nature of the capital markets and the evolving nature of the study of finance, commenters state that it is difficult, if not impossible, to reach consensus on the proper methodology to determine a fair rate of return on equity that produces the most accurate results at a given time.[250] In addition, the commenters state that presumptive or conclusive methodologies would, in effect, preclude the use of other methodologies and prejudge the issues.[251]

85. Most commenters advocate a flexible approach where the Commission considers all cost of equity methods and relevant evidence instead of codifying or using one method.[252] USTA suggests that the Commission should permit the utilization of all cost of equity methods in use by the financial and academic communities at the time of a represcription. USTA states that having a range of estimates available would reduce the chance of error, provide a measure of confidence that the result will be reasonable, and be preferable to relying on only one or two prescribed methods.[253]

86. Some commenters, however, oppose particular methods. FWA is against CAPM, because most small LECs are not publicly traded.[254] Centel argues that risk premium analyses should not use ten-year Treasury bonds as the "risk-free" investment,

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[246] See, e.g., USTA Comments at 47; Bell Atlantic Comments at 3; MCI Comments at 24; SBA Comments at 12; SNET Comments at 6; SWBT Comments at 2; United Comments at 5.

[247] See, e.g., Blossom Comments at 1; Mid-Iowa Co-op Comments at 2; Rural Telephone Service Comments at 2; UTELCO Comments at 2-3.

[248] Bell Atlantic Comments at 3; USTA Comments at 3.

[249] Bell Atlantic Comments at 3.

[250] USTA Comments at 48; SNET Comments at 6; SWBT Comments at 2; Rochester Comments at 29-30.

[251] SWBT Comments at 2; Rochester Comments at 29-30; MCI Comments at 24.

[252] See, e.g., SWBT Comments at 2; United Comments at 5; USTA Comments at 40.

[253] USTA Comments at 48-49.

[254] FWA Comments at 10.

because the lives of these bonds are too short. According to Centel, the investment's duration should be more comparable to the infinite maturity of common stock; Centel recommends thirty-year Treasury bonds or Aa utility bond.[255] MCI suggests that the Commission should require LECs to submit, at the outset of a represcription proceeding, classic DCF data for each quartile of the S&P 400, without prespecifying any portion as a possible benchmark.[256] SBA is indifferent to whether the DCF and the risk premium methods are used, but believes these methods will be accurate if properly specified. SBA recommends, however, that in applying these methods, we use stock indices for companies that mirror the financial resources of small LECs, rather than relying on the S&P 400. the largest 100 utilities, or other groupings from the New York Stock Exchange ("NYSE").[257]

87. Few commenters address two issues the Notice raised regarding the application of the DCF formula: quarterly compounding of dividends and the inclusion of flotation costs in the cost of equity. Centel and USTA maintain that quarterly compounding is not difficult to apply with current spreadsheet software and that DCF computations should reflect the quarterly payment of dividends.[258] Rochester states that the Commission should not prejudge quarterly compounding or flotation costs by adopting rules or methodologies that effectively reject them.[259] USTA maintains that we should allow participants in represcription proceedings to seek an adjustment for flotation costs, despite the lack of any separately recorded, out-of-pocket costs for the issuance of equity shares.[260] FWA opposes an allowance for flotation costs because small LECs do not sell additional stock through offerings to the general public.[261] MCI opposes as unnecessary both quarterly compounding of dividends and an allowance for flotation costs.[262]

3. Discussion

88. Equity prices are established in highly volatile and uncertain capital markets. The theories and methodologies analysts use to forecast these prices represent a rapidly expanding field of study. Different forecasting methodologies compete with each other for eminence, only to be superseded by other methodologies as conditions change. In addition,

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[255] Centel Comments at 12.

[256] MCI Comments at 27.

[257] SBA Comments at 12-13.

[258] Centel Comments at 11; USTA Comments at 53-54.

[259] Rochester Comments at 31-32.

[260] USTA Comments at 54.

[261] FWA Comments at 9.

[262] MCI Comments at 26.

each methodology has a number of permutations. Besides the number of methodologies available, there is the problem that each methodology assumes certain conditions that may, or may not, persist over time.[263] In these circumstances, we should not restrict ourselves to one methodology, or even a series of methodologies, that would be applied mechanically. Instead, we conclude that we should adopt a more accommodating and flexible position. To the extent resources permit, the final cost of equity in a represcription proceeding should represent a judgment reached after considering a wide variety of data and methodologies.

89. The flaw in the current rules governing determination of cost of equity is that they ignore these basic principles. Although those rules do not require the Commission to apply any particular methodology in estimating the cost of equity, they require the RHCs to apply two "historical" versions of the DCF formula and to submit the resulting data for inclusion in the record in represcription proceedings.[264] In the two represcription proceedings conducted under the Part 65 rules, we gave very little or no weight to these data.[265] Those rules also specify criteria for determining when firms have risks characteristics comparable to those of interstate access services.[266] In the 1986 represcription proceeding, we found significant problems with these criteria and gave analyses relying on them little weight.[267] In Docket 87-463, we proposed to improve the criteria by incorporating a cluster analysis.[268] In the 1990 represcription proceeding, we considered several cluster analyses presented by the parties and found them to be entitled to no weight because the analyses had failed to identify firms for which risks were comparable to those of interstate access service.[269]

90. These experiences have made us acutely aware that any cost of equity methodology we codify may not withstand the test of time. In these circumstances, we agree with the majority of the commenters that our rules should specify no cost of equity

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[263] See, e.g., Howard E. Thompson, Regulatory Finance: Financial Foundations of Return Regulation 8 (1991); Roger A. Morin, Regulatory Finance: Utilities' Cost of Capital 17 (1994).

[264] 47 C.F.R. §65.303.

[265] 1990 Represcription Order, 5 FCC Rcd at 7512, para. 48 (no weight); 1986 Represcription Order at para. 36 (very little weight).

[266] 47 C.F.R. §65.400.

[267] 1986 Represcription Order at paras. 19-23.

[268] See 1987 Notice, 2 FCC Rcd at 6493-94, paras. 18-28. Cluster analysis uses criteria to separate companies listed on the NYSE into discrete groups and to evaluate the risk characteristics of interstate access service. The group whose risk characteristics appear closest to those of interstate access service are deemed comparable to the entities that provide that service. Id.

[269] 1990 Represcription Order, 5 FCC Rcd at 7526, paras. 161-66.

methodology on which data would have to be submitted at the start of represcription proceedings. Instead, we will leave open all issues involved in the forecasting of equity costs. These open issues include questions regarding the data that we should use in applying particular methodologies, flotation costs, periods of compounding, and similar issues. In addition to simplifying the rules, this action will avert a potential unnecessary burden on the parties to future represcription proceedings.

91. In taking this action, we emphasize that the rules we adopt in this Order permit the Bureau to require interested persons to submit any information it deems necessary to decide, once the triggering event occurs, whether to institute a represcription proceeding or to develop the record, once a represcription proceeding begins.[270] This procedure will minimize the possibility that parties to future represcription proceedings will have to file data that proves useless. It places on interested persons the responsibilities to respond in a timely manner to Bureau data requests and to submit any additional information they believe will help us accurately estimate the cost of equity for LEC interstate access services.

D. Cost of Debt

1. Overview

92. The cost of debt relates to the sale of bonds and other fixed-income securities to finance telephone operations. The debt of a company includes short-term and long-term issues.[271] Part 65 requires each of the RHCs to perform detailed calculations to determine their embedded cost of debt, as reflected in the position statements (Form 10-K or 10-Q) the RHC recently filed with the Securities and Exchange Commission. In the 1990 represcription proceeding, we used the average of the RHCs' embedded costs of debt as one component of overall cost of capital calculation.[272]

93. In the Notice, we stated that we intended to consider using groups other than the RHCs in our cost of debt determination. Although the RHCs own the BOCs, they also have expanded into other ventures, both domestic and international. As they expand into new areas, their financial similarity to LECs providing interstate access service decreases substantially, and they cease to have the same risk-return properties. We, therefore, proposed to base our cost of debt determination on the debt costs of the BOCs, LECs with $100 million or more in annual revenues, and holding companies that own those LECs. We also proposed simplifying the method of calculating the embedded cost of debt. Section

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[270] See supra Section IV.B.3.

[271] Long-term debt is debt with a term of one year or more. All other debt is short-term.

[272] 1990 Represcription Order, 5 FCC Rcd at 7510, para. 28.

65.301 of our rules[273] presently requires the RHCs to consider separately each outstanding debt issue in calculating that component. We proposed to calculate any given company's embedded cost of debt by dividing the company's annual interest expense by its average outstanding debt during that year.[274]

94. In the event we continued to require separate consideration of each outstanding debt issue, we proposed replacing our current method of calculating the embedded cost of debt with the interest method, which is consistent with generally accepted accounting principles ("GAAP").[275] When companies issue debt at a premium above or a discount below the principal amount stated on the debt instrument, the effective rate of interest on the issue differs from the rate stated on that instrument.[276] Under GAAP, carriers account for premiums and discounts using the interest method. This method provides that the interest rate for each instrument equals the actual amount of interest expense implicit in the debt transaction. That rate is known when the debt is issued and remains constant over the term of debt.[277]

95. All the methods described above rely on the debt of discrete groups of carriers or their holding companies. As an alternative to these methods, we proposed to base our cost of debt determination on publicly available data regarding corporate debt. To compute long-term debt under this alternative, we proposed to use a composite of the yields on a random sample of outstanding corporate bonds rated "Aa" or better by Moody's. To compute short-term debt, we proposed to use the ten-day average of unsecured notes sold through dealers by major corporations.[278] We invited comment on all these matters.[279]

2. Comments

96. A number of commenters favor a composite cost of debt based on BOC data.[280] They contend that the BOCs' ARMIS reports contain all information necessary to compute

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[273] 47 C.F.R. §65.301.

[274] Notice, 7 FCC Rcd at 4698, paras. 77-78.

[275] Id. at 4698, para. 79.

[276] The effective rate of interest is lower with premiums and higher with discounts.

[277] See, e.g., Welsch and Zlatkovich, Intermediate Accounting, 641, 651-56 (8th ed. 1989). See also Notice, 7 FCC Rcd at 4698, para. 79.

[278] Notice, 7 FCC Rcd at 4698-99, para. 80.

[279] Id. at 4698, paras. 76-77.

[280] See, e.g., Centel Comments at 13; FWA Comments at 10; SWBT Comments at 2-3; United Comments at 8; USTA Comments at 66.

their composite cost of debt, are readily available, and conform to the Commission's Uniform System of Accounts.[281] SWBT argues that using these data would simplify the represcription process and be administratively efficient.[282] Other commenters maintain that relying on ARMIS data would eliminate any need for the Commission separately to determine the cost of short-term and long-term debt[283] or to determine a general corporate cost of debt.[284] NTCA points out that many state public utility commissions already rely on ARMIS data to determine the cost of debt.[285] United and USTA suggest that the Commission codify the ARMIS method in the rules, since it does not rely on an evolving financial theory.[286]

97. FWA, on the other hand, supports continuing the use of the RHCs' embedded cost of debt.[287] MCI favors using a composite of the embedded costs of debt of holding companies that own LECs earning revenue of $100 million or more annually, including the RHCs. This group includes the owners of all large and medium-size non-price cap LECs as well as the RHCs. MCI argues that, if the price cap LECs will be affected by the rate of return prescribed under the revised Part 65 procedures, then RHC debt costs should play a role in establishing the cost of debt for rate of return purposes.[288]

98. SBA states that the alternatives for calculating the cost of debt contained in the Notice are invalid, because the RHCs and the General Telephone Operating Companies ("GTOCs") are not subject to conventional rate of return regulation. SBA states that over 1250 of the 1300 rate of return LECs have annual revenues under $100 million and that the vast majority of these 1250 LECS have annual revenues under $40 million. SBA also states that these LECs do not issue stock or corporate bonds that are traded on the NYSE or American Stock Exchange. Consequently, SBA contends, it is doubtful that these companies could acquire debt at the same cost as the RHCs or GTOCs. SBA states that the Commission should base its cost of debt determination on debt costs of companies that face risks similar to those the rate of return LECs face. SBA, therefore, recommends that the Commission use a composite of these LECs' embedded costs of debt, which would take into

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[281] Centel Comments at 13; FWA Comments at 10; NTCA Comments at 5; Rochester Comments at 27-28; SWBT Comments at 2-3; United Comments at 8; USTA Comments at 66.

[282] SWBT Comments at 2-3.

[283] Rochester Comments at 27-28; USTA Comments at 67. See also SWBT Comments at 3.

[284] USTA Comments at 67-68.

[285] NTCA Comments at 5.

[286] United Comments at 8; USTA Comments at 67-69.

[287] FWA Comments at 10.

[288] MCI Comments at 28-29.

account the commercial, state, and federal financing of these carriers.[289]

99. The small LECs commenting in this proceeding oppose SBA's recommendation. These commenters state that any new rules adopted by the Commission should not use the capital costs or financial structures of the 1300 LECs regulated under rate of return. They state that the data for these carriers would be very costly to collect, would not be internally consistent, and in many cases would not be available. These commenters maintain that the capital structures and debt costs of the BOCs provide the best surrogate for the interstate access service costs of small LECs. They further state that the BOC data is representative of the industry as a whole, and can be averaged into composite industry figures and applied to the rate of return carriers.[290]

100. FWA contends that publicly available data on corporate debt would provide a reasonable proxy for the cost of debt for LEC interstate access services and would help the Commission establish a valid range for that cost in a represcription proceeding.[291] MCI, however, states that the Commission should not commit itself to using corporate debt data until it has determined how to isolate such debt costs. MCI argues that nothing in the record in this proceeding shows, for example, that a random sample of corporate bonds rated Aa or better would approximate the cost of debt for LEC interstate access service.[292]

101. USTA asserts that the methods the Notice proposed for calculating the costs of corporate debt are unnecessarily complex. USTA contends that a random sample of bonds would be inappropriate and less accurate than published composite averages such as Moody's Aa utility bond yield averages. USTA also points out that the Notice does not make clear what source the Commission would use to determine short-term debt costs. USTA suggests using a published source, such as the Federal Reserve Statistical Release G.13, which shows the monthly rate on six-month commercial paper.[293]

102. As indicated above, most cost of debt commenters support our proposal to simplify the method for calculating the embedded cost of debt. USTA states that individual calculations are burdensome, are no more accurate than composite calculations, and have no regulatory purpose.[294] Several commenters maintain that we should adopt the interest method

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[289] SBA Comments at 14-15.

[290] See, e.g., Delhi Comments at 1-2; Lexington Comments at 1-2; Mid-Iowa Comments at 1-2; OPASTCO Comments at 3; Rural Service at 1-2.

[291] FWA Comments at 11.

[292] MCI Comments at 29.

[293] USTA Comments at 68.

[294] Id. at 66.

of calculating the cost of debt.[295] Centel, United, and USTA state ARMIS data already incorporate this method.[296] United and USTA recommend that any cost of debt methodology we adopt not be binding in future represcription proceedings.[297]

3. Discussion

103. We adopt a composite cost of debt based on the embedded cost of debt of all LECs with annual revenues of $100 million or more.[298] We will calculate this composite using ARMIS data for these LECs as set forth in the following equation:

$$\text{Embedded Cost of Debt} = \frac{\text{Total Annual Interest Expense}}{\text{Average Outstanding Debt}}$$

The results of this calculation will be presumptive in future represcription proceedings. If the triggering event occurs,[299] we will apply this methodology and include its results in the notice inquiring into whether a represcription proceeding should be initiated. This will provide all interested parties an opportunity to comment on this methodology and to suggest alternative methodologies for estimating the cost of debt for LEC interstate access service. The Common Carrier Bureau, of course, will be able to obtain through data requests any data required to apply any alternative methodology.

104. We adopt this presumptive methodology because, more than any alternative method, it promises to further our goal of simplifying future represcription proceedings without sacrificing needed accuracy. Because it relies on ARMIS data, this methodology eliminates the need for the burdensome review of individual debt issues required by our current rules. It also incorporates the GAAP interest method for computing bond discounts and premiums. In addition, by relying on data regarding all LECs with annual revenues of $100 million or more, rather than BOC data or holding company data, the methodology appears to provide a reasonable proxy for the cost of debt the rate of return LECs incur in the provision of interstate access services.

105. SBA recommends that we use a composite of the rate of return LECs' embedded costs of debt to determine the cost of debt component. At present, however, we do not obtain on a routine basis data that would allow us to apply SBA's methodology.

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[295] SWBT Comments at 3; Centel Comments at 13; FWA Comments at 11; United Comments at 8-9; USTA Comments at 67. We describe this method in supra para. 94.

[296] Centel Comments at 13; United Comments at 8-9; USTA Comments at 67.

[297] United Comments at 8; USTA Comments at 69.

[298] We do not require average schedule companies to file ARMIS reports.

[299] See supra Section IV.A.

Moreover, we agree with the small LEC commenters that we should not impose a data collection requirement on them to implement SBA's recommendation. Instead, we should rely on our ARMIS data to obtain a reasonable surrogate for the interstate access service costs of small LECs. We, therefore, are not adopting SBA's recommendation in this Order. If it appears that knowing the small LECs' actual costs of debt may help us determine whether a represcription proceeding is warranted or increase substantially the accuracy of a future represcription, we will obtain the necessary data at that time.

E. Cost of Preferred Stock

1. Overview

106. Part 65 treats preferred stock in the same manner as short-term debt. The cost of preferred stock is the most recently available embedded dividend cost (i.e., dividend divided by book value) as of the initial filing in a represcription proceeding.[300] In the Notice, we invited comment on whether we should continue to include a preferred stock component within the capital structure we use to determine the cost of capital for LEC interstate access service.[301] We proposed, if we retained a preferred stock component, to continue treating preferred stock like debt. We invited comment on whether we should apply any of the proposed cost of debt methods to determine the cost of preferred stock. We stated, for example, that if we were to calculate the cost of debt component by dividing total annual interest expense by average outstanding debt, we could calculate the preferred stock component by dividing total annual dividends on preferred stock by total net proceeds from the issuance of outstanding preferred stock.[302]

2. Comments

107. Centel maintains that a method for computing the cost of preferred stock is necessary, only if we adopt a capital structure that recognizes preferred stock as a separate capital structure component. For example, Centel indicates, if the BOCs' capital structures are used, no methodology for computing the cost of preferred stock would be necessary, because the BOCs have no preferred stock.[303] Other commenters state that the rules should include a methodology for computing the cost of preferred stock, because BOCs may issue this type of stock in the future or another type of capital structure may be adopted.[304]

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[300] See 47 C.F.R. §65.302. See also 84-800 Phase II Order, 51 Fed.Reg. at 1803.

[301] Notice, 7 FCC Rcd at 4699-500, para. 86.

[302] Id. at 4699, para. 82.

[303] Centel Comments at 13-14.

[304] United Comments at 9; USTA Comments at 69.

108. In the event we adopt a capital structure that includes preferred stock, the commenters argue that we should calculate the cost of preferred stock in a manner similar to cost of debt.[305] United and USTA suggest ARMIS data can be used to determine the cost of preferred stock.[306] USTA states that there is no need to identify separate preferred stock issues.[307] USTA states further that any preferred stock methodology should specify a methodology for estimating net proceeds as a percentage of face value, since ARMIS reports do not show the net proceeds and amortization of issuance costs, discounts, and premiums on preferred stock.[308] FWA states that the current rules treat preferred stock correctly.[309]

3. Discussion

109. In a subsequent portion of this Order,[310] we determine that the composite capital structures of all LECs with annual revenues of $100 million or more should be presumptive in future represcription proceedings. Although these LECs' capital structures currently include no preferred stock, our rules should recognize that they may issue such stock in the future. We also believe, consistent with the commenters' views, that we should treat preferred stock like debt. Therefore, we will calculate the cost of preferred stock using ARMIS data for these LECs, as set forth in the following equation:

$$\text{Cost of Preferred Stock} = \frac{\text{Total Annual Dividends on Preferred Stock}}{\text{Proceeds from the Issuance of Outstanding Preferred Stock}}$$

110. As with the cost of debt methodology, this preferred stock methodology will be presumptive in future represcription proceedings. Although USTA suggests that we should specify a method for estimating net proceeds as a percentage of face value, we believe any resulting adjustment would likely have little effect on represcription results. LECs now have very little preferred stock outstanding, and we are aware of no plans for LECs to issue substantial amounts of it in the future. Therefore, any adjustments to implement USTA's suggestion would most likely be negligible. In these circumstances, we decline to specify a method for making such adjustments at this time. If a party to a future represcription proceeding believes that the differences between net proceeds and face values are substantial, it may suggest appropriate adjustments at that time.

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[305] Centel Comments at 14; USTA Comments at 69; FWA Comments at 11.

[306] United Comments at 9; USTA Comments at 69.

[307] USTA Comments at 69.

[308] Id. at 60-70.

[309] FWA Comments at 11.

[310] See infra Part V.F.3.

F. Capital Structure

1. Overview

111. Part 65 requires the RHCs to calculate and submit the percentages of equity, debt, and preferred stock in their capital structures for inclusion in the record in represcription proceedings.[311] In the 1990 represcription proceeding, we used the composite of the RHCs' capital structures to compute the cost of capital for LEC interstate access service.[312] In the Notice, we indicated that this approach might remain acceptable for determining an appropriate capital structure for the interstate access operations of the rate of return LECs. We invited comment, however, on three alternatives to using RHC capital structure data: using the composite capital structures of LECs that have $100 million or more in annual revenue or their holding companies; using a composite of a representative sample of the rate of return LECs' capital structures; and selecting a fixed capital structure based on one of the capital structures mentioned above. We asked the commenters to address whether the various alternatives would produce credible capital structures and would also further our goal of simplifying future represcription proceedings, without providing incentives for manipulation.[313]

112. We also invited comment on whether we should separately identify short-term debt and preferred stock components within the capital structure and, if so, how we should perform that identification.[314]

2. Comments

113. LEC commenters and USTA generally support using a composite of the BOCs' capital structures, as reflected in ARMIS data, to determine the capital structure component of our overall cost of capital calculation.[315] These commenters contend that the BOCs' capital structures reflect the business risks LECs face.[316] They assert that ARMIS reports provide all the data needed to compute the BOCs' composite capital structure, and that

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[311] 47 C.F.R. §65.300.

[312] 1990 Represcription Order, 5 FCC Rcd at 7510, para. 28.

[313] Notice, 7 FCC Rcd at 4699, paras. 84-86.

[314] Id. at para. 86.

[315] Centel Comments at 14-16; SNET Comments at 5; SWBT Comments at 3; United Comments at 6-8; USTA Comments at 58-59.

[316] Centel Comments at 16; Rochester Comments at 25; SWBT Comments at 3; USTA Comments at 59.

reliance on these data will reduce the burdens of the represcription process.[317] Several LECs and USTA maintain that the RHCs have no incentives to manipulate LEC capital structures and that the BOCs issue their own debt.[318] They argue that state regulatory commissions and independent rating agencies scrutinize the BOCs' capital structures.[319] USTA further points out that all LECs with annual revenues of $100 million or more, including the BOCs, have bonds held by independent investors who also monitor and assess those LECs' capital structures.[320]

114. MCI recommends using the capital structures of holding companies of LECs earning revenues of $100 million or more annually, including the RHCs. MCI contends that our cost of capital calculation should reflect the RHCs' capital structures, if a represcription is going to affect the BOCs' rates.[321] Other commenters, however, oppose using the RHCs' capital structures. These commenters state that because the RHCs are engaged in cellular, international, and other ventures, their capital structures reflect risks other than those of the LECs alone.[322]

115. SBA supports a capital structure based on a composite of the capital structures of a representative sample of the rate of return LECs. SBA maintains that this alternative would provide a more accurate picture of the financial structure of carriers not subject to price cap regulation than would the other capital structure alternatives.[323] SBA would support a fixed capital structure only if the Commission adopts a capital structure based on a composite of the capital structures of LECs with less than $100 million in annual revenues.[324] MCI states, however, that there is no need for a fixed capital structure at this time. According to MCI, if LEC capital structures change in the future, valid economic reasons may justify use of the actual capital structures.[325]

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[317] Centel Comments at 14-15; Rochester at 28; SNET Comments at 5; SWBT Comments at 3, 8; United Comments at 8-9; USTA Comments at 64-65.

[318] Centel Comments at 14; Rochester Comments at 26; SWBT Comments at 3; United Comments at 6-7; USTA Comments at 59-61.

[319] Centel Comments at 14-16; Rochester Comments at 26; SWBT Comments at 3; USTA Comments at 61.

[320] USTA Comments at 61.

[321] MCI Comments at 29-30. The RHCs own the BOCs.

[322] Centel Comments at 15; Rochester Comments at 24-26; SBA Comments at 16; SWBT Comments at 3; United Comments at 6; USTA Comments at 58-9.

[323] SBA Comments at 16.

[324] Id. at 16-17.

[325] MCI Comments at 30, n.50.

116. FWA opposes using the weighted average cost of capital methodology to estimate the cost of capital for the rate of return LECs. FWA states that small independent LECs do not make public stock offerings and that there is no public information available regarding the value of their stock. Because of this lack of information, FWA states, it is impossible to determine a return using a calculation based on small LEC-specific debt and equity components. FWA argues that determinations of small LEC capital structures often lead to de minimis or even negative equity components, as regulators calculate the equity component by subtracting debt from the net rate base. FWA states that this is clearly incorrect and that we should replace our current RHC methodology with use measures of financial returns. FWA specifically recommends the times interest expense ratio coverage that several major lenders employ in lending to small companies. According to FWA, this ratio gives a better analytical view of the financial condition of small carriers and their shareholder value.[326]

117. United and USTA indicate that we should treat short-term and long-term debt as one component within the capital structure, and the cost of preferred stock as a separate capital structure component. According to these commenters, preferred stock is a separate financial instrument that has its own embedded costs.[327]

118. Rochester and USTA contend that we should not select a capital structure that would be conclusive in future represcription proceedings. These commenters maintain that the appropriate capital structure for the composite will always be changing, because business risks and capital market conditions evolve over time. In their view, a conclusive capital structure could reduce LEC network investment by limiting the equity investment on which an exchange carrier can earn a reasonable return.[328] United agrees and states the capital structure we choose should be presumptive, rather than conclusive, in future represcription proceedings.[329]

3. Discussion

119. We adopt a composite capital structure based on the capital structures of all LECs with annual revenues of $100 million or more. This capital structure will have three components: equity, debt, and preferred stock. We combine short-term and long-term debt into one component because, under our cost of debt methodology, we need not distinguish between these two types of debt. We include a separate preferred stock component because,

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[326] FWA Comments at 3-5.

[327] United Comments at 8-9; USTA Comments at 64, 67.

[328] Rochester Comments at 26; USTA Comments at 63-4.

[329] United Comments at 8.

as United and USTA assert, preferred stock is a separate investor-supplied source of funds with its own embedded costs.

120. We will rely on ARMIS data to determine each of these components as well as their weight within the capital structure. We adopt this methodology because, like our cost of debt methodology, it furthers our goal of simplifying future represcription proceedings without sacrificing needed accuracy. Also, like our cost of debt methodology, this capital structure methodology will be presumptive in future represcription proceedings. We will include the results from this methodology in any notice inquiring into whether a represcription proceeding should be initiated.

121. We adopt this presumptive methodology because, as we found in our cost of debt determination,[330] it provides greater promise than any other alternative of furthering our goal of simplifying future represcription proceedings without sacrificing needed accuracy. For instance, relying on holding company capital structures, as MCI recommends, would increase the risks of distortions from the holding companies' nonregulated ventures. In addition, both that methodology and a decision to rely on the actual capital structures of rate of return LECs, as SBA urges, would require that we obtain additional data from the LECs on a routine basis so that they would be available in the event the triggering event occurs. Because our obtaining such data would burden small LECs, we will defer questions regarding whether we should obtain and rely on such data until that time. Finally, we reject FWA's apparent position that we should replace our weighted average cost of capital methodology with one that relies on small LECs' income in relation to interest expenses. While FWA does not describe how a methodology that compares income to interest expenses would work, the times interest expense ratio is usually used by financial analysts and lenders to assess the long-term risks of insolvency of firms such as small LECs.[331] Those risks differ from the risks that small LECs face in providing interstate access services.

G. State Cost of Capital Determinations

1. Overview

122. Section 65.201 of our rules[332] requires RHCs to provide information related to their operating companies' prescribed intrastate rates of return in their initial submissions. This information must include each state cost of capital determination that is applicable to the BOCs' intrastate exchange carrier operations as of the initial submissions' due date as well as a certified copy of each state decision establishing those costs of capital. In represcription proceedings, these data serve as a check on the reasonableness of other cost of capital

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[330] See infra Section V.D.

[331] Clyde P. Stickely, Financial Statement Analysis: A Strategic Perspective, 389 (2nd ed. 1993).

[332] 47 C.F.R. §65.201.

estimates.[333]

123. In the Notice, we invited comment on whether we should require the filing of state cost of capital determinations applicable to the largest of the rate of return LECs in lieu of, or in addition to, the RHC-related determinations that must be filed under our current rule. To reduce the burden of our filing requirements, we proposed to eliminate the requirement that the copies of the state decisions be certified.[334]

2. Comments

124. We received only one comment on state cost of capital determinations. Centel states that state cost of capital determinations should not be used as a reasonableness test in determining the cost of capital for LEC interstate access services. According to Centel, comparing state cost of equity determinations with other cost of capital estimates ignores differences among state regulatory programs and the degrees of competition in each state.[335]

3. Discussion

125. We agree with Centel in this instance and believe that this requirement should be eliminated. The states now regulate many large LECs under incentive regulation plans similar to our LEC price cap program. Because of this, many of the state cost of capital determinations for BOCs or other LECs with $100 million or more in annual revenues are stale and would be entitled to little or no weight in any represcription proceeding.[336] Even when the determinations are not stale, they provide only indirect information regarding the cost of capital for interstate access service, since they serve only as a check on the reasonableness of the cost of equity figures and as an indicator of trends.[337] In these circumstances, we see no benefit in automatically requiring the submission of this information in our new rules, but we may require the submission of the most recent determinations in future represcription proceedings. These submissions may include the state cost of capital determination for small LECs. Because the states still regulate many of these LECs on a rate or return basis, the state prescriptions may prove useful in evaluating other cost of capital estimates.

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[333] See 1990 Represcription Order, 5 FCC Rcd at 7513, 7528, paras. 53, 180.

[334] Notice, 7 FCC Rcd at 4700, para. 89.

[335] Centel Comments at 16-17.

[336] See 1990 Represcription Order, 5 FCC Rcd at 7513, para. 53.

[337] Id.

H. Miscellaneous Issues

1. Interexchange Carriers

126. Part 65 includes rules for represcribing a rate of return for interexchange carriers that are required by Commission order to be regulated on a rate of return basis.[338] In the Notice, in recognition of our removal of the only carrier that had ever been subject to these rules, AT&T, entirely from rate of return regulation, we proposed to eliminate them. FWA states that represcription hearings for interexchange carriers are unnecessary, primarily because AT&T is under price caps.[339] We agree. Seeing no potential use for these rules, we eliminate them.[340]

2. Calculation Specificity

127. Part 65 requires most cost of capital calculations to be carried out to the eighth decimal place.[341] In the Notice, we stated that this degree of specificity was unnecessary and tentatively concluded that cost of capital calculations need only be carried out to two decimal places.[342]

128. FWA supports this proposal.[343] USTA, however, recommends that calculations be carried out to the third decimal place and then rounded to the second decimal place.[344] To ensure meaningful results, we are adopting a rule requiring that the final computed cost of equity, cost of preferred stock, cost of debt, and their weights in the capital structure be accurate to two decimal places. This may require using more specificity in intermediate calculations and analyses as well as the rounding suggested by USTA. We are making the parties and their professional experts participating in represcription proceedings responsible for achieving this level of accuracy in their recommendations for the final results.

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[338] See 47 C.F.R. §§65.500(a), 65.500, 65.510.

[339] FWA Comments at 12.

[340] We will address any issues that may arise regarding Alascom's cost of capital in our tariff review process.

[341] See, e.g., 47 C.F.R. §§65.300, 65.304(d).

[342] Notice, 7 FCC Rcd at 4700, para. 92.

[343] FWA Comments at 12.

[344] USTA Comments at 70.

VI. Enforcement Procedures

A. Overview

129. In Docket No. 84-800, we promulgated rules to ensure the carriers' compliance with our rate of return prescriptions.[345] These enforcement rules provide for the automatic refund, with interest, of earnings exceeding "the maximum allowable rate of return."[346] For LECs, we specified that this rate of return equals the prescribed rate of return plus buffer zones of 25 basis points on overall interstate access earnings and 40 basis points on earnings within each of three interstate access service categories -- common line, traffic sensitive, and special access.[347] The enforcement rules require the LECs to monitor their interstate access earnings over two-year periods.[348] When those earnings exceed the "maximum allowable rate of return" on either an overall or an access category basis, the rules state that LECs must refund the excess earnings through prospective rate adjustments or direct distribution to customers.[349]

130. In the Automatic Refund Decision, the D.C. Circuit held that this automatic refund rule constituted arbitrary and capricious agency action in violation of the Administrative Procedure Act.[350] The Court based its decision solely on a perceived contradiction between the refund mechanism and the rate of return prescription it purports to enforce.[351] The Court found the refund rule inconsistent with the view that the rate of return represents a minimum and maximum allowable return, a view the Court attributed to the Commission, because the refund rule could cause a carrier to earn less than the authorized rate of return.[352] The Court stated that "[s]ince the Commission views the rate of return as a minimum, the refund rule under the Commission's view would operate over the long run to

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[345] 47 C.F.R. §§65.700-65.703.

[346] Id. §65.703.

[347] Id. §§65.700(a), 65.702(b).

[348] Id. §65.701.

[349] Id. §65.703.

[350] Automatic Refund Decision, 836 F.2d at 1389 (citing 5 U.S.C. § 706(2)(A) (1982)). See also Ohio Bell Telephone Co. v. FCC, 949 F.2d 864 (6th Cir. 1991) (overturning, as inconsistent with the Commission policies establishing permissible rates of return, a Commission order requiring carriers to refund special access overearnings for 1985 through 1988).

[351] Automatic Refund Decision, 836 F.2d at 1390.

[352] Id. at 1390-91.

put a carrier out of business."[353] The Court remanded this automatic refund rule to the Commission to fashion a refund mechanism that comports with the Commission's understanding of its rate of return prescription.[354]

131. In the Notice, we stated that the prescribed rate of return constitutes a point within a broad range of reasonableness, and not at the same time "both a minimum and maximum" allowable return.[355] This statement reflected our determination in the 1990 Represcription Order that the prescribed rate of return does not represent "a unique balance point such that '[i]f the rate were higher, the balance would tip in favor of the investor; if lower, it would tip in favor of the consumer.'"[356] Our rate of return prescription represents neither the maximum nor minimum point necessary to satisfy the constitutional requirement that an agency rate order "viewed in its entirety" must produce a just and reasonable "total effect" on the regulated business.[357] Instead, we select the prescribed rate of return, based on our consideration of all relevant factors, from a narrower zone within the zone bounded on the lower end by the constitutional minimum.[358] A substantial gap exists between that rate of return and an earnings level that, if sustained over time, would represent an unconstitutional taking of property.[359]

B. Enforcement Mechanisms

1. Overview

132. In the Notice, we stated that we could choose from among a wide range of enforcement mechanisms, including an automatic refund rule, to enforce the prescribed interstate rate of return.[360] We proposed, however, to repeal the automatic refund rule and to

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[353] Id. at 1390.

[354] Id. at 1393.

[355] Notice, 7 FCC Rcd at 4701, para. 96 (quoting Automatic Refund Decision, 836 F.2d at 1390).

[356] 1990 Represcription Order, 5 FCC Rcd at 7532, para. 217.

[357] See FPC v. Hope Natural Gas, 320 U.S. at 602.

[358] Notice, 7 FCC Rcd at 4701, para. 97.

[359] As we explained in the 1990 represcription proceeding, "[i]nvocation of the concept of balancing often conjures an image of a scale, or possibly, and more negatively, a see saw, that can only achieve balance at one point." 1990 Represcription Order, 5 FCC Rcd at 7540, n.313. We continue to believe that the visual metaphor of "a rocking chair that can be made to tip over frontwards or backwards, but that will remain upright through a considerable part of its total range of motion" accurately illustrates the balance of investor and consumer interests that our rate of return prescriptions reflect. Id.

[360] Notice, 7 FCC Rcd at 4702, para. 98.

rely instead on the tariff review and complaint processes to enforce our rate of return prescriptions.[361] We invited interested parties to comment on these proposals.[362]

2. Comments

133. Most commenters who addressed this area favor the elimination of the automatic refund rule.[363] Commenters contend that the rule prevents rate of return carriers from operating efficiently and reducing costs,[364] denies consideration of equitable principles in remedying overearnings,[365] and constitutes arbitrary and capricious agency action.[366] Centel argues that the Commission may not, even in complaint actions under Section 208 of the Communications Act,[367] require a carrier to refund overearnings, unless it also allows the carrier to recover underearnings. Because no interexchange revenues and only a small portion of LEC interstate access revenues remain under rate of return regulation, Centel contends that we have less need for an automatic refund rule today than we had at the time of its adoption in 1985.[368] Other commenters maintain that our tariff review and complaint processes will adequately deter violations of our rate of return prescriptions and allow us to correct any violations that occur.[369] U S West agrees and states a carrier that can reduce its expenses below the expected level should retain all resulting profits.[370] Regardless of the enforcement mechanism we choose, USTA and other commenters argue that when carriers exceed the prescribed interstate rate of return, the Commission may grant only prospective

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[361] Id.

[362] Id.

[363] Alltel Comments at 2; Bell Atlantic Comments at 4; BellSouth Comments at 8; BellSouth Reply at 7-8; Centel Comments at 17-18; Lufkin-Conroe Reply at 1-2; NECA Comments at 6-7; NECA Reply at 5-6; NTCA Comments at 7; NTCA Reply at 2-3; NYNEX Reply at 4; OPASTCO Comments at 4; Rochester Comments at 33; USTA Comments at 71; USTA Reply at 11-12; U S West Comments at 3-4; U S West Reply at 4-5.

[364] USTA Comments at 76.

[365] NECA Comments at 6-7; Rochester Comments at 36; USTA Comments at 73.

[366] BellSouth Comments at 3-4; Centel Comments at 21-23; Lufkin-Conroe at 4-5; Rochester Comments at 32-37; USTA Comments at 71-73; U S West Reply at 4.

[367] 47 U.S.C. §208.

[368] Centel Comments at 17.

[369] BellSouth Comments at 7-8; BellSouth Reply at 9; Lufkin-Conroe at 6; NTCA Comments at 7; NTCA Reply at 2; OPASTCO Comments at 4.

[370] U S West Comments at 4; U S West Reply at 5.

relief, not retroactive refunds.[371] NECA and USTA contend that we should measure compliance with our rate of return prescription on an overall interstate access basis.[372] This, they argue, will help average the earnings of NECA's individual pools and, thereby, increase the likelihood that NECA pool participants will earn returns at the authorized level.[373]

134. Only MCI wants the Commission to retain an automatic refund rule.[374] Citing New England Telephone Co. v. FCC[375] and the Automatic Refund Decision,[376] MCI argues that the Commission has the statutory authority to employ a refund mechanism in conjunction with rate of return regulation.[377] MCI believes that the automatic refund rule is consistent with the Commission's understanding of its rate of return prescription, as described in the 1990 Represcription Order.[378] MCI, though, favors modifying that rule to include a special waiver process that allows LECs to seek relief from refund obligations that would have a confiscatory effect.[379] Because of the number and small size of most rate of return LECs, MCI argues an automatic refund rule represents the only efficient way to enforce the rate of return prescription.[380] MCI believes that the Commission should continue to determine violations of the rate of return prescription on a service category-by-service category basis, as well as an overall interstate access basis.[381]

3. Discussion

135. We conclude that repealing the automatic refund rule would best serve the

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[371] USTA Comments at 71 (citing Illinois Bell v. FCC, 966 F.2d 1478 (D.C. Cir. 1992) (holding that "the Commission has no authority under [Section] 205 to order the refunds contemplated only under [Section] 204")). See also Centel Comments at 25-27; Lufkin-Conroe at 2-5; Rochester Comments at 33.

[372] NECA Comments at 12; NECA Reply Comments at 10; USTA Comments at 81.

[373] NECA Comments at 12; USTA Comments at 81.

[374] MCI Comments at 30.

[375] 826 F.2d 1101 (D.C. Cir. 1987) (New England Telephone).

[376] Automatic Refund Decision, 836 F.2d at 1392. Even though the Automatic Refund Decision remanded our specific refund rule, it affirmed the holding in New England Telephone, supra, that upheld our statutory authority to order refunds when a carrier has violated an outstanding rate of return prescription.

[377] MCI Comments at 31-32.

[378] Id. at 31 (citing 1990 Represcription Order, 5 FCC Rcd at 7532, para. 217).

[379] Id. at 32.

[380] Id. at 30.

[381] Id. at 31-32.

public interest. We believe that the best policy is to rely instead on the tariff review and complaint processes to enforce our rate of return prescription. Because our price cap initiatives have removed all interexchange and most interstate access revenues from our rate of return regulation, we have far less need for an automatic refund rule today than we had at the time of its adoption in 1985. The reduction in the amount of revenues subject to rate of return regulation has reduced the possible impact of "potential administrative quagmires" caused by determining compliance with our rate of return prescriptions on a case-by-case basis.[382] In addition, as discussed more fully below, the principles we employ in addressing complaints alleging LEC overcharges are well-established and, we believe, no more difficult to implement than would be the approach MCI suggests, which would combine an automatic refund rule and special waiver process. In these circumstances, we believe that relying on our tariff review and complaint processes is the most cost-effective way to deter violations of prescriptions by the remaining rate of return LECs and allow us to correct any violations that do occur.[383]

136. When rate of return LECs file tariffs, unless regulated under our optional incentive program,[384] they propose rates based on their projected costs, including a return calculated using the prescribed interstate rate of return. We review many of these projections before allowing the tariffs to take effect and, where appropriate, suspend or investigate the tariff. If, based on our investigation, we conclude that the tariff would result in overearnings, we require its refiling so that overearnings will not result. In addition, we require the LECs to submit quarterly reports that allow us to monitor LEC earnings.[385] In the event of overearnings, we have the authority, after giving carriers a full opportunity for hearing, to prescribe just and reasonable rates "to be thereafter observed" by the carrier.[386]

137. In addition, our recent experience with complaint actions under Section 208 of the Act[387] demonstrates the effectiveness of our complaint process as a tool for enforcing our

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[382] Phase I Order, 50 Fed.Reg. 41350, 41354 (released September 30, 1985).

[383] BellSouth Comments at 7-8; BellSouth Reply at 9; Lufkin-Conroe at 6; NTCA Comments at 7; NTCA Reply at 2; OPASTCO Comments at 4.

[384] See supra para. 14.

[385] 47 C.F.R. § 65.600(b). See also Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements, 1 FCC Rcd 952 (1986), recon. denied, 3 FCC Rcd 5340 (1987).

[386] 47 U.S.C. §205.

[387] Id. §208.

rate of return prescription.[388] In conjunction with Sections 206 and 207 of the Act,[389] Section 208 entitles any person whom a common carrier has injured by its unlawful rates to file a complaint for damages with the Commission. If we find the carrier liable for damages, we can then order the carrier to pay the complainant the amount to which it is entitled.[390]

138. We have received hundreds of complaints from customers alleging that the LECs had charged them excessive rates for interstate access service during each two-year monitoring period beginning with 1985-86.[391] In addressing these complaints, we determine a LEC's liability, if any, for violations of a rate of return prescription.[392] If we find such liability, we then calculate the damages the complainant suffered and award appropriate relief.[393] While not precluding other possible measures of damages, we have, after careful consideration of the arguments and evidence presented in the individual complaint actions, based our damage awards on the difference between the amount the customer had paid and the amount that it would have paid if the LEC had charged rates that produced earnings at the prescribed ceiling. We offset this difference by the amount the customer had underpaid the LEC for services in other access categories during the same monitoring period.[394] These damage calculations reflect the buffer zones the automatic refund rule established.[395] The D.C. Circuit is currently reviewing this approach.[396] We will revisit our decision to eliminate the automatic refund rule if the D.C. Circuit's decision on review warrants such

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[388] See, e.g., MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., 5 FCC Rcd 216 (1990), recon., 5 FCC Rcd 3463 (1990) (MCI Liability Order), appeal dismissed sub nom. Mountain States Telephone & Telegraph Co. v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam); MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., 8 FCC Rcd 1517 (1993) (MCI Damages Order), appeal docketed sub nom. MCI Telecommunications Corp. v. FCC, Nos. 93-1166 et al (D.C. Cir. Feb 18, 1993).

[389] 47 U.S.C. §§206-07.

[390] Id. §209.

[391] In light of our adoption of the sharing and low-end adjustment mechanisms in the LEC Price Cap Order, complaints that overall company earnings that comply with the sharing mechanism are excessive in view of costs will not lie. 5 FCC Rcd at 6802, para. 128.

[392] See, e.g., MCI Liability Order, 5 FCC Rcd 3463.

[393] See, e.g., MCI Damages Order, 8 FCC Rcd at 1517. While we initially handled complaint actions against rate of return LECs in bifurcated proceedings, we have more recently addressed both liability and damages in the same proceeding. See, e.g., ACC Long Distance Corp. v. New York Telephone Co., 9 FCC Rcd 1659 (1994); LiTel Telecommunications Corp. v. U S West Communications, Inc., 9 FCC Rcd 1619 (1994).

[394] Id. at 1525-26, paras. 30-43.

[395] Id.

[396] MCI Telecommunications Corp. v. FCC, Nos. 93-1166 et al. (D.C. Cir. Feb. 18, 1993).

action.

139. We will continue to enforce compliance with our rate of return prescriptions both for service categories and for interstate access overall.[397] Enforcement only on an overall interstate access basis, as USTA and NECA propose, would undermine some of the purposes of our access charge plan. We designed that plan in part to change the relationship among rates for end user services in order to reduce discrimination and preferences within the existing rate structure. That plan requires carriers to target each service category to earn the same return. The same considerations lead us to enforce compliance with our rate of return prescriptions on a service category-by-service category basis.

C. Buffer Zones and Enforcement Period

1. Overview

140. As stated previously, the automatic refund rule establishes buffer zones above the prescribed interstate rate of return of 25 basis points on overall interstate earnings and 40 basis points each on earnings within the common line, traffic sensitive, and special access categories. In the Notice, we sought comment on the reasonableness of these buffer zones for the remaining rate of return LECs, regardless of our action in regard to the automatic refund rule. We also invited comment on whether to change the current two-year enforcement period for monitoring compliance with the rate of return prescription.

2. Comments

141. The commenters who address the issue find the current buffer zones inadequate.[398] Several commenters argue that a buffer zone of 100 basis points would recognize fluctuations in demand and operating costs inherent in their regulated industry.[399] MCI states that a wider buffer zone would ensure that our refund mechanisms viewed in their entirety produce a just and reasonable total effect on the regulated business.[400] The commenters also recommend that the Commission maintain an enforcement period of at least two years.[401] Centel, though, contends that the enforcement period should cover the full

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[397] See Phase I Order, 50 Fed.Reg. 41350, 41352 (released September 30, 1985).

[398] Centel Comments at 26; NECA Comments at 9-10; NECA Reply at 3; NTCA Reply at 3; OPASTCO Comments at 4; USTA Comments at 81.

[399] Centel Comments at 26; NECA Comments at 9-10; NECA Reply at 10; USTA Comments at 81.

[400] MCI Comments at 32-33.

[401] NECA Comments at 13; NECA Reply at 10; OPASTCO Comments at 4; USTA Comments at 82.

period a rate remains in effect.[402]

3. Discussion

142. We retain buffer zones at their present levels. The current prescribed rate of return is a market-based rate of return that reflects investor expectations regarding, among other matters, the effects of these zones.[403] Any modifications to them might change the risks and opportunities for the carriers subject to our rate of return regulation. While we are not convinced that there is any need to change the buffer zones, we will revisit this issue, if appropriate, when we represcribe the authorized rate of return for LEC interstate access service.

143. As we have explained, buffer zones play an important role in our complaint process, both substantively and procedurally. That experience has made clear that these zones adequately recognize the effects fluctuations in demand and operating costs have on rate of return LECs' earnings, while protecting customers against unreasonably high rates. They also help define whether overearnings have occurred, and the measure of damages when overearnings occur. No commenters has provided persuasive evidence that there is any need to change the buffer zones. We do, however, repeal those portions of our buffer zone rules that apply to interexchange carriers that are no longer regulated on a traditional, rate of return basis.[404]

144. We also retain the two-year enforcement period for monitoring compliance with our rate of return prescription. A two-year period provides sufficient time to reduce the risk of underearnings from targeting errors and demand and cost fluctuations, while providing a reasonable period within which to measure compliance.

VII. Ordering Clauses

145. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151,

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[402] Centel Comments at 26-27.

[403] See Illinois Bell v. FCC, 988 F.2d at 1264.

[404] We reserve any issues that may arise regarding possible overearnings by Alascom for our complaint process.

154(i), 154(j), 201-205, 218-220, 403, that Part 65 of the Commission's rules, 47 C.F.R. Part 65, IS AMENDED, as specified in Appendix 4.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX 1

COMMENTERS

ALLTEL Service Corporation ("ALLTEL")
The Bell Atlantic Telephone Companies ("Bell Atlantic")
BellSouth Telecommunications, Inc. ("BellSouth")
The Blossom Telephone Company ("Blossom")
Casco Telephone Company ("Casco")
Central Telephone Company ("Central")
Cincinnati Bell Telephone Company (Cincinnati")
Community Service Telephone Company ("Community Service")
Delhi Telephone Company ("Delhi")
Fred Williamson & Associates, Inc. ("FW&A")
Frederick & Warinner
General Services Administration ("GSA")
Hampden Telephone Company ("Hampden")
Kaleva Telephone Company ("Kaleva")
LaHarpe Telephone Company ("LaHarpe")
Lexington Telephone Company ("Lexington")
Ligonier Telephone Company ("Ligonier")
MCI Telecommunications Corporation ("MCI")
Mid-Iowa Telephone Co-op Association ("Mid-Iowa")
National Telephone Cooperative Association ("NTCA")
Nebraska Central Telephone Company ("Nebraska")
Nicholville Telephone Company, Inc. ("Nicholville")
Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO")
Pacific Bell and Nevada Bell ("Pacific")
Roanoke and Botetourt Telephone Company ("Roanoke")
Rochester Telephone Corporation ("Rochester")
Rochester Telephone Company ("RTC")
Rural Telephone Company, Inc. ("Rural Service")
Scio Mutual Telephone Association ("Scio")
Shenandoah Telephone Company ("Shenandoah")
United States Small Business Administration ("SBA")
Southern New England Telephone Company ("SNET")
Southwestern Bell Telephone Company ("Southwestern")
Topsham Telephone Co., Inc ("Topsham")
United States Telephone Association ("USTA")
United Telephone Companies ("United")
U S West Communications, Inc. ("US West")
UTELCO, Inc. ("Utelco")
Van Horne Coop. Telephone Company ("Van Horne")
Wisconsin State Telephone Association ("WSTA")

REPLY COMMENTERS

The Ameritech Operating Companies ("Ameritech")
BellSouth Telecommunications, Inc. ("BellSouth")
The General Services Administration ("GSA")
Lufkin-Conroe Telephone Exchange, Inc. ("Lufkin")
MCI Telecommunications Corporation ("MCI")
National Exchange Carrier Association, Inc. ("NECA")
National Telephone Cooperative Association ("NTCA")
NYNEX Telephone Companies ("NYNEX")
Pacific Bell and Nevada Bell ("Pacific")
United Telephone Companies ("United")
United States Telephone Association ("USTA")
U S West Communications, Inc. ("US West")

Appendix 2

Chart 1

10 Year T-Bonds Monthly Avg Yield 5/81 to 2/95
Actual Rate of Return (ROR) Prescriptions

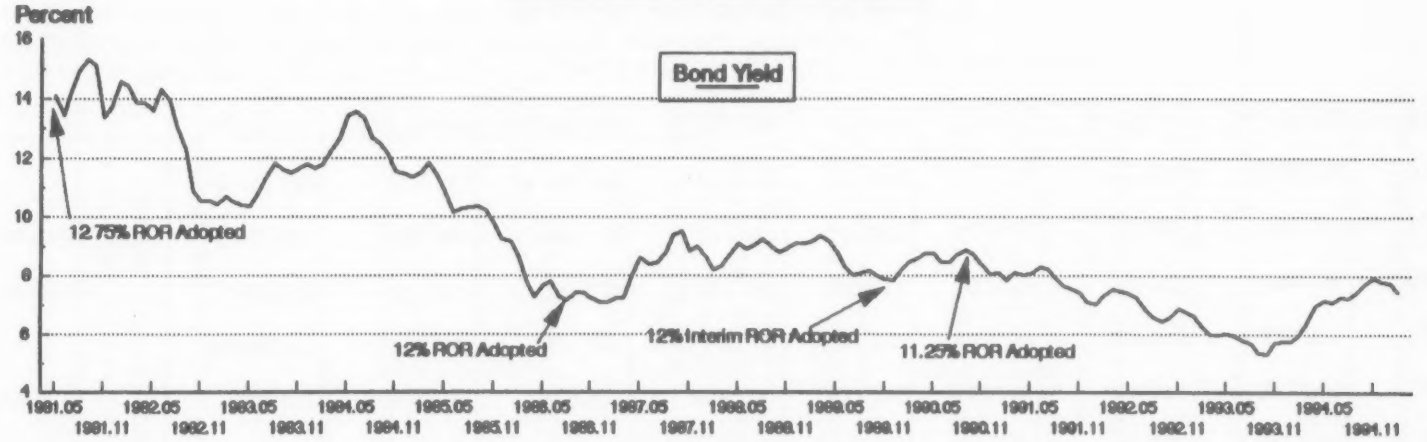

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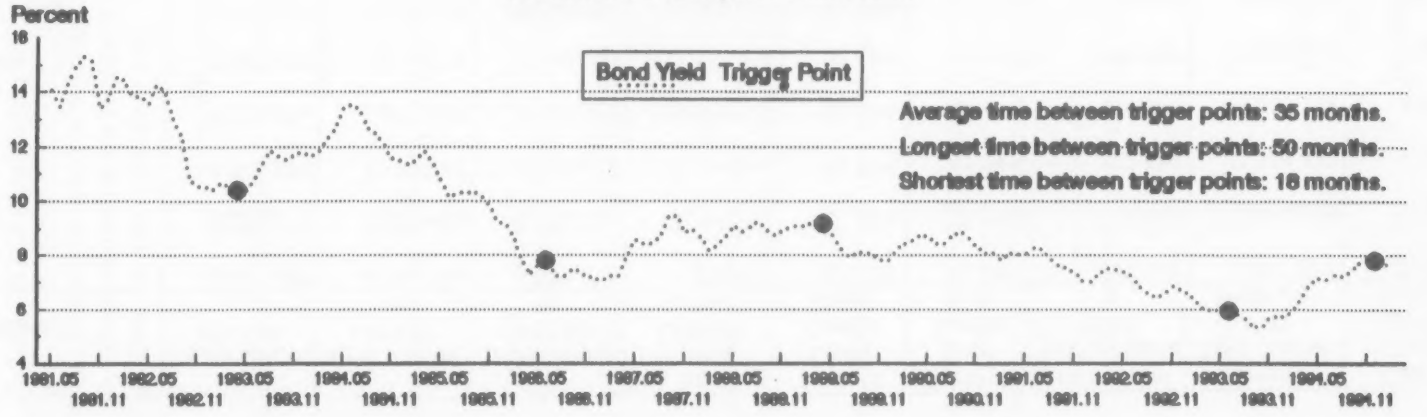
Chart 2

10 Year T-Bonds Monthly Avg Yield 5/81 to 2/95
Hypothetical Trigger Points from the May 1981
Rate of Return Prescription to the Present



10YRBOND.DRW

Appendix 3

Computation of Equity and Debt Capital Structure and Cost of Debt.
Source: ARMIS USOA Report, FCC Report 43-02, Tables B-1, Balance Sheet Accounts and I-1, Income Statement Accounts. (See note below.)
(Dollars in thousands, except for percentages.)

Company	Equity Capital 12/31/93 a	Debt Capital 12/31/92 b	Debt Capital 12/31/93 c	Total Capital 12/31/93 d=a+c	Percent Equity Capital e=a/d	Percent Debt Capital f=c/d	Interest and Related Items 1993 g	Average Debt Capital 1993 h=(b+c)/2	Cost of Debt 1993 i=g/h
Ameritech	6,341,962	5,004,178	5,034,379	11,376,341	55.75%	44.25%	352,125	5,019,279	7.02%
Bell Atlantic	9,005,232	5,897,482	5,750,554	14,755,786	61.03%	38.97%	444,615	5,824,018	7.63%
BellSouth	10,743,264	7,170,243	7,538,620	18,281,884	58.76%	41.24%	587,686	7,354,432	7.99%
NYNEX	8,103,799	6,283,805	5,724,879	13,828,678	58.60%	41.40%	519,035	6,004,342	8.64%
Pacific Telesis	6,355,030	5,499,128	5,748,934	12,103,964	52.50%	47.50%	438,837	5,624,031	7.80%
Southwestern Bell	7,151,076	4,993,926	5,048,721	12,199,797	58.62%	41.38%	385,445	5,021,324	7.68%
US West	7,675,714	5,173,782	5,348,270	13,023,984	58.94%	41.06%	394,351	5,261,026	7.50%
Contel	981,780	400,962	489,910	1,471,690	66.71%	33.29%	45,692	445,436	10.26%
Cincinnatti Bell	445,715	248,196	310,623	756,338	58.93%	41.07%	23,141	279,410	8.28%
GTE/Contel	9,686,577	7,306,362	7,374,281	17,060,858	56.78%	43.22%	588,041	7,340,322	8.01%
Rochester Telephone	666,019	481,257	381,030	1,047,049	63.61%	36.39%	40,742	431,144	9.45%
Southern New England Tel.	1,105,631	833,494	986,100	2,091,731	52.86%	47.14%	67,961	909,797	7.47%
United	2,115,452	1,405,113	1,424,286	3,539,738	59.76%	40.24%	113,879	1,414,700	8.05%
Totals	70,377,251	50,697,928	51,160,587	121,537,838	57.91%	42.09%	4,001,550	50,929,258	7.86%

Note: Debt is the sum of Rows 4020, 4050, 4060 and 420 from Table B-1 of FCC Report 43-02. Equity is from Row 440 from Table B-1 of FCC Report 43-02. Interest and related items is from Table I-1 of FCC Report 43-02.
Only those companies that filed FCC Report 43-02 for both 1992 and 1993 were included in the above table.

APPENDIX 4--RULES

Parts 65 of the Commission's Rules and Regulations, 47 C.F.R. Part 65, is amended as follows:

Subpart A - General

1. Rules section 65.1 is revised to read as follows:

§ 65.1 Application of Part 65.

(a) This part establishes procedures and methodologies for Commission prescription of an authorized unitary interstate exchange access rate of return and individual rates of return for the interstate exchange access rates of certain carriers pursuant to § 65.102. This part shall apply to those interstate services of local exchange carriers as the Commission shall designate by rule or order, except that all local exchange carriers shall provide to the Commission that information which the Commission requests for purposes of conducting prescription proceedings pursuant to this part.

(b) Local exchange carriers subject to §§ 61.41 through 61.49 are exempt from the requirements of this part with the following exceptions:

(1) Except as otherwise required by Commission order, carriers subject to §§ 61.41 through 61.49 shall employ the rate of return value calculated for interstate access services in complying with any applicable rules under Parts 36 and 69 that require a return component;

(2) Carriers subject to §§ 61.41 through 61.49 shall be subject to §§ 65.600(d);

(3) Carriers subject to §§ 61.41 through 61.49 shall continue to comply with the prescribed rate of return when offering any services specified in § 61.42(f) unless the Commission otherwise directs; and

(4) Carriers subject to §§ 61.41 through 61.49 shall comply with Commission information requests made pursuant to § 65.1(a).

Subpart B - Procedures

2. Section 65.100, 65.101, 65.102, 65.103, 65.104 and 65.105 are revised to read as follows:

§ 65.100 Participation and acceptance of service designation.

(a) All interstate exchange access carriers, their customers, and any member of the public may participate in rate of return proceedings to determine the authorized unitary interstate exchange access or individual interstate exchange access rates of return authorized pursuant to § 65.102.

(b) Participants shall state in their initial pleading in a prescription proceeding

whether they wish to receive service of documents and other material filed in the proceeding. Participants that wish to receive service by hand on the filing dates when so required by Part 65 shall specify in their initial pleading in a prescription proceeding, as specified in §§ 65.103 (b) and (c), an agent for acceptance of service by hand in the District of Columbia. The participant may elect in its pleading to receive service by mail or upon an agent at another location. When such an election is made, other participants need not complete service on the filing date, and requests for extension of time due to delays in completion of service will not be entertained.

§ 65.101 Initiation of unitary rate of return prescription proceedings

(a) Whenever the Commission determines that the monthly average yields on ten (10) year United States Treasury securities remain, for a consecutive six (6) month period, at least 150 basis points above or below the average of the monthly average yields in effect for the consecutive six (6) month period immediately prior to the effective date of the current prescription, the Commission shall issue a notice inquiring whether a rate of return prescription according to this part should commence. This notice shall state: (1) The deadlines for filing initial and reply comments regarding the notice; (2) The cost of debt, cost of preferred stock, and capital structure computed in accordance with §§ 65.302, 65.303, and 65.304; and (3) such other information as the Commission may deem proper.

(b) Based on the information submitted in response to the notice described in § 65.101(a), and on any other information specifically identified, the Commission may issue a notice initiating a prescription proceeding pursuant to this part.

(c) The Chief, Common Carrier Bureau, may issue the notice described in § 65.101(a).

§ 65.102 Petitions for exclusion from unitary treatment and for individual treatment in determining authorized return for interstate exchange access service.

(a) Exclusion from unitary treatment will be granted for a period of two years if the cost of capital for interstate exchange service is so low as to be confiscatory because it is outside the zone of reasonableness for the individual carrier's required rate of return for interstate exchange access services.

(b) A petition for exclusion from unitary treatment and for individual treatment must plead with particularity the exceptional facts and circumstances that justify individual treatment. The showing shall include a demonstration that the exceptional facts and circumstances are not of transitory effect, such that exclusion for a period of at least two years is justified.

(c) A petition for exclusion from unitary treatment and for individual treatment may be filed at any time. When a petition is filed at a time other than that specified in § 65.103(b)(2), the petitioner must provide compelling evidence that its need for individual treatment is not simply the result of short-term fluctuations in the cost of capital or similar events.

§ 65.103 Procedures for filing rate of return submissions.

(a) Rate of return submissions listed in § 65.103(b)(1) and (c) may include any relevant information, subject to the page limitations of § 65.104. The Chief, Common Carrier

Bureau, may require from carriers providing interstate services, and from other participants submitting rate of return submissions, data, studies or other information that are reasonably calculated to lead to a full and fair record.

(b) In proceedings to prescribe an authorized unitary rate of return on interstate access services, interested parties may file direct case submissions, responses, and rebuttals. Direct case submissions shall be filed within sixty (60) calendar days following the effective date of a Commission notice initiating a rate of return proceeding pursuant to § 65.101(b). Rate of return submissions responsive to the direct case submissions shall be filed within sixty (60) calendar days after the deadline for filings direct case submissions. Rebuttal submissions shall be filed within twenty-one (21) calendar days after the deadline for filing responsive submissions.

(c) Petitions for exclusion from unitary treatment and for individual treatment may be filed on the same date as the deadline for filing responsive rate of return submissions. Oppositions shall be filed within 35 calendar days thereafter. Rebuttal submissions shall be filed within 21 calendar days after the deadline for filing responsive submissions.

(d) An original and 4 copies of all rate of return submissions shall be filed with the Secretary.

(e) The filing party shall serve a copy of each rate of return submission, other than an initial submission, on all participants who have filed a designation of service notice pursuant to § 65.100(b)

§ 65.104 Page limitations for rate of return submissions.

(a) Rate of return submissions, including all argument, attachments, appendices, supplements, and supporting materials, such as testimony, data and documents, but excluding tables of contents summaries of argument, shall be subject to the following double spaced typewritten page limits:

(1) The direct case submission of any participant shall not exceed 70 pages in length.

(2) The responsive submission of any participant shall not exceed 70 pages in length.

(3) The rebuttal submission of any participant shall not exceed 50 pages in length.

(4) Petitions for exclusion from unitary treatment shall not exceed 70 pages in length. Oppositions to petitions for exclusion shall not exceed 50 pages in length. Rebuttals shall not exceed 35 pages in length.

§ 65.105 Discovery.

(a) Participants shall file with each rate of return submission copies of all information, including studies, financial analysts' reports, and any other documents relied upon by participants or their experts in the preparation of their submission. Information filed pursuant to this paragraph for which protection from disclosure is sought shall be filed subject to protective orders which shall be duly granted by the Chief, Common Carrier Bureau, for good

cause shown.

(b) Participants may file written interrogatories and requests for documents directed to any rate of return submission and not otherwise filed pursuant to § 65.105(a). The permissible scope of examination is that participants may be examined upon any matter, not privileged, that will demonstrably lead to the production of material, relevant, decisionally significant evidence.

(c) Discovery requests pursuant to § 65.105(b), including written interrogatories, shall be filed within 14 calendar days after the filing of the rate of return submission to which the request is directed. Discovery requests that are not opposed shall be complied with within 14 calendar days of the request date.

(d) Oppositions to discovery requests made pursuant to § 65.105(b), including written interrogatories, shall be filed within 7 calendar days after requests are filed. The Chief, Common Carrier Bureau, shall rule upon any such opposition. Except as stayed by the Commission or a Court, any required response to a discovery request that is opposed shall be provided within 14 calendar days after release of the ruling of the Chief, Common Carrier Bureau.

(e) An original and 4 copies of all information described in § 65.105(a) and all, requests, oppositions, and responses made pursuant to §§ 65.105 (a), (b) and (d) shall be filed with the Secretary.

(f) Service of requests, oppositions, and responses made pursuant to §§65.105(b), and (d) shall be made upon all participants who have filed a designation of service notice pursuant to § 65.100(b). Service of requests upon participants who have filed designation of service notices pursuant to § 65.100(b) shall be made by hand on the filing dates thereof.

3. Sections 65.106 is removed.

Subpart C - Exchange Carriers

4. Sections 65.200, 65.201, 65.400, 65.500 and 65.501 are removed.

5. Sections 65.300, 65.301, 65.302, 65.303 and 65.304 are revised and a new section 65.305 is added to read as follows:

§ 65.300 Calculations of the components and weights of the cost of capital.

(a) Sections 65.301- 65.303 specify the calculations that are to be performed in computing cost of debt, cost of preferred stock, and financial structure weights for prescription proceedings. The calculations shall determine, where applicable, a composite cost of debt. a composite cost of preferred stock, and a composite financial structure for all local exchange carriers with annual revenues in excess of $100 million. The calculations shall be based on data reported to the Commission in FCC Report 43-02. (See 47 C.F.R. § 43.21). The results of the calculations shall be used in the represcription proceeding to which they relate unless the record in that proceeding shows that their use would be unreasonable.

(b) Excluded from cost of capital calculations made pursuant to § 65.300 shall be those sources of financing that are not investor supplied, or that are otherwise subtracted from

a carrier's rate base pursuant to Commission orders governing the calculation of net rate base amounts in tariff filings that are made pursuant to section 203 of the Communications Act of 1934, 47 U.S.C. 203, or that were treated as "zero cost" sources of financing in section 450 and Subpart G of Part 65 of the Commission's rules. Specially excluded are: accounts payable, accrued taxes, accrued interest, dividends payable, deferred credits and operating reserves, deferred taxes and deferred tax credits.

§ 65.301 Cost of equity.

The cost of equity shall be determined in represcription proceedings after giving full consideration to the evidence in the record, including such evidence as the Commission may officially notice.

§ 65.302 Cost of debt.

The formula for determining the cost of debt is equal to:

$$\text{Embedded Cost of Debt} = \frac{\text{Total Annual Interest Expense}}{\text{Average Outstanding Debt}}$$

Where:

"Total Annual Interest Expense" is the total interest expense for the most recent two years for all local exchange carriers with annual revenues of $100 million or more.

"Average Outstanding Debt" is the average of the total debt for the most recent two years for all local exchange carriers with annual revenues of $100 million or more.

§ 65.303 Cost of preferred stock.

The formula for determining the cost of preferred stock is:

$$\text{Cost of Preferred Stock} = \frac{\text{Total Annual Preferred Dividends}}{\text{Proceeds from the Issuance of Preferred Stock}}$$

Where:

"Total Annual Preferred Dividends" is the total dividends on preferred stock for the most recent two year for all local exchange carriers with annual revenues of $100 million or more.

"Proceeds from the Issuance of Preferred Stock" is the average of the total net proceeds from the issuance of preferred stock for the most recent two years for all local exchange carriers with annual revenues of $100 million or more.

§ 65.304 Capital structure.

The proportion of each cost of capital component in the capital structure is equal to:

Proportion in the capital structure =

$$\frac{\text{Book Value of particular component}}{\text{Book Value of Debt + Book Value of Preferred Stock + Book Value of Equity}}$$

Where:

"Book Value of particular component" is the total of the book values of that component for all local exchange carriers with annual revenues of $100 million or more.

"Book Value of Debt + Book Value of Preferred Stock + Book Value of Equity" is the total of the book values of all the components for all local exchange carriers with annual revenues of $100 million or more.

The total of all proportions shall equal 1.00.

§ 65.305 Calculation of the weighted average cost of capital.

(a) The composite weighted average cost of capital is the sum of the cost of debt, the cost of preferred stock, and the cost of equity, each weighted by its proportion in the capital structure of the telephone companies.

(b) Unless the Commission determines to the contrary in a prescription proceeding, the composite weighted average cost of debt and cost of preferred stock is the composite weight computed in accordance with Section 65.304 multiplied by the composite cost of that component computed in accordance with Section 65.301 or Section 65.302, as applicable. The composite weighted average cost of equity will be determined in each prescription proceeding.

§ 65.306 Calculation accuracy.

In a prescription proceeding, the final determinations of the cost of equity, cost of debt, cost of preferred stock and their capital structure weights shall be accurate to two decimal places.

Subpart E - Rate of Return Reports

6. Section 65.600 is revised to read as follows:

§ 65.600 Rate of return reports.

(a) Subpart E shall apply to those interstate communications common carriers and exchange carriers that are so designated by Commission order.

(b) ***** Final adjustments to the enforcement period shall be made by September 30 of the year following the enforcement period to ensure that any refunds can be properly reflected in an annual access filing.

(c) Each interexchange carrier subject to §§ 61.41 through 61.49 shall file with the Commission within three (3) months after the end of each calendar year, the total interstate rate of return for that year for all interstate services subject to regulation by the Commission. Each such filing shall include a report of the total revenues, total expenses and taxes, operating

income, and the rate base. A copy of the filing shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

(d) (1) Each local exchange carrier or group of affiliated carriers subject to §§ 61.41 through 61.49 of this chapter shall file with the Commission within three (3) months after the end of each calendar year a report of its total interstate rate of return for that year. Such filings shall include a report of the total revenues, total expenses and taxes, operating income, and the rate base. Reports shall be filed on the appropriate form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be retained in the principal office of the respondent and shall be filed in such a manner as to be readily available for reference and inspection.

(2) Each local exchange carrier or group of affiliated carriers subject to §§ 61.41 through 61.49 of this chapter shall file with the Commission within fifteen (15) months after the end of each calendar year a report reflecting any corrections or modifications to the report filed pursuant to paragraph (d)(1) above. Reports shall be filed on the appropriate form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective form. At least one copy of the report shall be retained in the principal office of the respondent and shall be filed in such a manner as to be readily available for reference and inspection.

Subpart F - Maximum Allowable Rates of Return

7. Section 65.703 is removed.

8. Sections 65.700, 65.701, and 65.702 are revised to read as follows:

§ 65.700 Determining the maximum allowable rate of return.

(a) The maximum allowable rate of return for any exchange carrier's earnings on any access service category shall be determined by adding a fixed increment of four-tenths of one percent to the exchange carrier's prescribed interstate rate of return.

(b) The maximum allowable rate of return for any exchange carrier's overall interstate earnings for all access service categories shall be determined by adding a fixed increment of one-quarter of one percent to the exchange carrier's prescribed interstate rate of return.

(c) The maximum allowable rate of return for rates filed by local exchange carrier subject to § 61.50 shall be determined by adding a fixed increment of one and one-half percent to the carrier's prescribed interstate rate of return.

§ 65.701 Period of review.

(a) For exchange carriers subject to this part, interstate earnings shall be measured over a two-year period to determine compliance with the maximum allowable rate of return. The review periods shall commence on January 1 in odd-numbered years and shall end on December 31 in even numbered years.

§ 65.702 Measurement of interstate service earnings.

(a) For exchange carriers, earnings shall be measured separately for each access service category for purposes of determining compliance with the maximum allowable rate of return. The access service categories shall be: an aggregated category consisting of Special Access, § 69.113, and Contribution Charges for Special Access Expanded Interconnection, § 69.122; Connection Charges for Expanded Interconnection, § 69.121; Common Line, §§ 69.104-69.105; and an aggregated category consisting of Line Termination, § 69.106, Intercept, § 69.108, Local Switching, § 69.107, Transport, §§ 69.110-69.112, 69.124, 69.125, and Information, § 69.109. The Billing and Collection access element shall not be included in any access service category for purposes of this part. The Commission will also separately review exchange carrier overall interstate earnings subject to this part for determining compliance with the maximum allowable rate of return determined by § 65.700 (b).

(b) For exchange carriers, earnings shall be measured for purposes of determining compliance with the maximum allowable rates of return separately for each study area; provided, however that if the carrier has filed or concurred in access tariffs aggregating costs and rates for two or more study areas, the earnings will be determined for the aggregated study areas rather than for each study area separately. If an exchange carrier has not utilized the same level of study area aggregation during the entire two-year earnings review period, then the carrier's earnings will be measured for the entire two-year period on the basis of the tariffs in effect at the end of the second year of the two year review period; provided, however, that if tariffs representing a higher level of study area aggregation were not in effect for at least eight months in the second year, then the carrier's earnings will be measured on the basis of the study area level of aggregation in effect for the majority of the two year period; provided further, that any carrier that was not a member of the National Exchange Carrier Association or other voluntary pools for both years of the two-year review period will have its earnings reviewed individually for the full two-year period.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-141

In the Matter of the Application of	)	
	)	
US West Communications, Inc.	)	
	)	
For Authority under Section 214	)	File No. W-P-C 6868
of the Communications Act of 1934,	)	
as amended, to construct, operate,	)	
own, and maintain facilities and	)	
equipment to provide video dialtone	)	
service in portions of the Omaha,	)	
Nebraska service area	)	

ORDER ON RECONSIDERATION

Adopted: April 4, 1995 Released: April 12, 1995

By the Commission:

I. INTRODUCTION

1. In November 1993, the Commission granted conditional Section 214 authority to US West for a limited video dialtone technology and market trial in sections of Omaha, Nebraska,[1] subject to our video dialtone rules.[2] In January 1994, Metrovision, Inc. (Metrovision) and the National Cable Television Association, Inc. (NCTA) filed Petitions For Reconsideration of the

[1] US West Communications, Inc., 9 FCC Rcd 184 (1993) (Omaha Authorization). In that Order, we directed US West either to limit its technical trial to no more than 2,500 homes passed, or to charge participants at tariffed rates after 30 days. It chose the former. Letter from Lawrence Sarjeant, US West to William Caton, Acting Secretary, Federal Communications Commission, Jan. 21, 1994. On December 23, 1994, the Commission granted US West's request to modify its Omaha offering. US West Communications, Order and Authorization, W-P-C-6868, FCC 94-350, released Jan. 6, 1995.

[2] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Second Report and Order), aff'd & modified on recon., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244 (1994) (VDT Recon Order), appeal pending sub nom., Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

Omaha Authorization.[3] Petitioners contend that US West's proposal is not truly a trial, that it is anticompetitive, and that US West has not provided sufficient information to enable the Commission to conclude that the carrier's proposal is in the public interest. For the reasons stated below, we deny the requests of both Metrovision and NCTA.

II. PETITION AND COMMENTS

2. **Bona fide trial.** Both petitioners assert that US West's actions since the Omaha Authorization make it clear that US West will not be using the Omaha offering as a trial. They note that US West has applied for authorization to conduct a commercial video dialtone offering that would pass 330,000 homes in Denver, Colorado and has announced plans to build video dialtone systems in twenty major markets. They state that this indicates that US West has already made a decision to offer video dialtone service on a commercial basis, and thus has no need for a trial. They contend, therefore, that since the Omaha proposal is a commercial offering, US West should be required to submit the data required to evaluate its application under the standards for a commercial offering.[4]

3. US West responds that its commercial applications for Denver and other cities are not inconsistent with its desire to use Omaha as a trial. It asserts that the rapid evolution of telecommunications markets does not allow it the luxury of awaiting the results of the Omaha trial before requesting authority to provide video dialtone services in other locations. It explains that its attempt to secure all necessary regulatory approvals to deploy video dialtone service commercially prior to the completion of the Omaha trial is "just good business," which does not diminish the importance of the Omaha trial in any way.[5]

4. **Anticompetitive effects of free carriage.** Metrovision argues that permitting US West to provide free carriage to video program providers during a six month technical trial would be anticompetitive. It asserts that the Omaha Authorization recognized the anticompetitive effect of free carriage when it required that US West either charge for carriage after thirty days or limit its trial to 2,500 households. Metrovision asserts that it is inconsistent to conclude that free carriage has anticompetitive effects for a 10,000 household trial, but not a 2,500 household trial. Metrovision states that sixty-percent of homes passed generally subscribe to cable television when there is a monthly charge, and thus there can be no question that at least this many will take the free service offered by US West. It also notes that free carriage will enable programmers to offer service at artificially low rates. Metrovision estimates that US West's trial will attract 1,600 subscribers. Metrovision concludes that it could therefore lose ten-percent of

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[3] Metrovision, Pet. for Recon., Jan. 21, 1994; NCTA, Pet. for Recon., Jan. 21, 1994; US West and petitioners then filed responsive pleadings. Opposition, U.S. West, Feb. 3, 1994; Metrovision, Reply, Feb. 16, 1994; NCTA, Reply, Feb. 16, 1994.

[4] Metrovision Pet. at 7-8; NCTA at 1-2.

[5] US West Opp. at 5-6.

its 16,000 subscribers, which, it claims, would devastate its Omaha system.[6]

5. US West challenges Metrovision's estimate of the effect that the proposed trial would have on Metrovision's business, charging that it is strongly biased. US West explains that, while it will not charge for carriage during its technical trial, this does not imply that video program providers will not charge consumers for their offerings. US West further asserts that its proposed network is untested with unknown service quality. US West states that Metrovision's estimate unrealistically assumes that sixty-four-percent of the homes US West passes will subscribe to its service and that all of these subscribers will drop Metrovision's cable service.[7]

6. **Insufficient Information.** Presuming that US West's Omaha application is for a commercial offering, petitioners argue that the Commission must require US West to provide details to show that its offering is cost justified. Metrovision asks that the Commission require US West to identify the service providers with which it has contracted and to report its projected revenues for the trial, and whether it believes that the architecture selected is the optimal method of providing video dialtone. NCTA complains that existing video dialtone safeguards do not provide any video dialtone-specific mechanisms for jurisdictional separations, cost allocation, and nondiscrimination. It argues that these issues should be addressed comprehensively, and that the Commission's responsibility to ensure that telephone ratepayers are not burdened by video dialtone does not permit it to delegate choices regarding such allocations to US West, even for a trial. Petitioners assert that, without the necessary data and safeguards, the Commission cannot conclude that US West's Omaha trial is economically justified and in the public interest.[8] US West responds that it stated that no costs associated with its video dialtone trial will appear as a regulated expense without prior authorization of the Commission.[9]

III. DISCUSSION

7. Bona fide **trial.** We reject arguments that US West's requests for commercial video dialtone authority subsequent to the Omaha Authorization demonstrate that US West's Omaha offering is not actually a trial offering. In fact, US West recently amended several of its Section 214 commercial applications based on information obtained from construction of its Omaha system. In amending these applications, US West stated, "through its experience in constructing Omaha video dialtone facilities and other services, US West has determined that the current Omaha architecture is not the most efficient means of supporting video dialtone service going

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[6] Metrovision Pet. at 4-5.

[7] US West Opp. at 3 n.9.

[8] Metrovision Pet. at 8-9; NCTA Pet. at 2,4.

[9] US West Opp. at 6, citing Omaha Authorization at para.35(a).

forward."[10] These amendments show that, contrary to petitioners' arguments, US West is using the Omaha trial as a bona fide trial to help it determine what technologies and architectures may be best suited for its commercial offerings.[11]

8. **Anticompetitive effects.** We also affirm our initial rejection of Metrovision's charge that US West's small trial would be anticompetitive. The Commission has a mandate under the Communications Act to encourage the provision of new technologies and services to the public.[12] Technical trials of new facilities enable carriers to test new technologies and learn how best to deploy them. For technical trials to have value, carriers must be assured that customers will use the technology tested. For this reason, we permit carriers to offer technical trials on a limited basis without charge. In the Omaha Authorization, we required US West either to limit its technical trial to passing 2,500 homes or to charge for the service. We concluded that permitting it to offer service at no charge for six months to 2,500 homes would not be anticompetitive. Metrovision offers no new reason that convinces us that this conclusion was incorrect or that the risks of anticompetitive effects outweigh the benefits of allowing US West to conduct this limited technical trial.

9. **Insufficient information.** Finally, as we recognize this application to be one for a trial, not a commercial offering, we reject petitioners' assertion that US West has failed to submit the information that we would require it to submit if it were seeking authorization for a commercial offering. Furthermore, we have already considered and rejected arguments that we should defer processing of video dialtone applications pending completion of a comprehensive review of our accounting and cost allocation rules. In rejecting these arguments, we concluded that existing rules, coupled with the additional measures adopted in the VDT Recon Order, would adequately protect against cross-subsidization and discrimination, and we so find here.[13]

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[10] See, e.g., U.S. West Communications, W-P-C-6921, Amendment to Portland Application at 2.

[11] See also Chesapeake & Potomac Telephone Company of Virginia, File No. W-P-C 6834, (adopted Jan. 11, 1995) para. 45 (approving market trial even though C&P has Section 214 applications pending to provide commercial video dialtone service).

[12] 47 U.S.C. §157.

[13] VDT Recon Order at 321-47 paras. 161-223.

IV. ORDERING CLAUSE

10. IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the Petitions for Reconsideration filed by Metrovision, Inc. and the National Cable Television Association are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-150
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992: Rate Regulation	)	

TENTH ORDER ON RECONSIDERATION

Adopted: April 7, 1995 Released: April 26, 1995

I. Introduction

1. In this Order, the Commission on its own motion modifies reporting requirements described in its *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking ("Second Reconsideration Order")*[1] which direct certain small systems and low price systems to calculate both their "transition" rates and their "full reduction rates" for submission on applicable rate forms.

II. Elimination of Parallel Rate Tracking

A. Background

2. In the *Second Reconsideration Order*, we required regulated cable systems, as a general matter, to reduce their rates by the full competitive differential established in that Order.[2] We further provided, however, that certain qualifying systems would be eligible for transition treatment under which such systems would not be required to reduce their rates by the full competitive differential. These transition systems include "cable operators which have a total subscriber base of 15,000 or fewer customers and which are not affiliated with a larger operator."[3] They also include systems having March 31, 1994 rates that are at or

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[1] Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994).

[2] *Id.* at para. 109.

[3] *Id.* at para. 110.

below the revised benchmark and systems having March 31, 1994 rates above the benchmark but having permitted rates at or below the benchmark.[4]

3. We further provided in the *Second Reconsideration Order* that a system qualifying for transition relief would not be able to adjust its transition rate for inflation until its transition rate equaled its full reduction rate.[5] We required transition systems to calculate both their transition and full reduction rates for the purpose of future rate adjustments.[6] To enable parallel tracking of the transition and full reduction rates, we established on the FCC Form 1210, the form used to modify already justified rates, a reporting module acknowledging the difference in inflation adjustments for the two rates. All other cost adjustments, however, were allowed for both transition and full reduction rate calculations.

B. Discussion

4. In the *Ninth Order on Reconsideration*,[7] we determined that it would be appropriate to allow transition systems to adjust their transition rates for inflation. By lifting the prohibition on inflation adjustments for transition rates, we eliminated the only difference in adjustment mechanisms between transition and full reduction rates. Accordingly, it is no longer necessary to require systems eligible for transition relief to render separate calculations for adjustments in transition and full reduction rates.

5. In light of the foregoing, and in order to relieve transition system operators of burdens associated with the separate calculation of transition and full reduction rates, we are eliminating the requirement that transition system operators report both rates in their applications for external rate adjustments. Rather, such systems will only be required to report their transition rates adjusted pursuant to the commission's price cap rules for inflation, changes in external costs and changes in the number of channels on regulated tiers.[8]

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[4] *Id.* at para. 110.

[5] *Id.* at para. 131.

[6] *Id.* at para. 130.

[7] Ninth Order on Reconsideration, MM Docket No. 92-266, FCC 95-43 (February 6, 1995).

[8] If there are any systems that were eligible for transition relief, but for which the full reduction rate exceeded the transition rate prior to the effective date of the Ninth Order on Reconsideration, such systems are no longer transition systems as of the effective date of the *Ninth Order on Reconsideration* and will continue to report their full reduction rate.

We will make correlative adjustments on the FCC Form 1210.[9]

III. Regulatory Flexibility Act Analysis

6. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-12, the Commission's final analysis with respect to the Eleventh Order on Reconsideration is as follows:

7. Need and purpose of this action. The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992), pertaining to rate regulation, adopts revised rules and procedures intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

8. Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the *Report and Order and Further Notice of Proposed Rulemaking*.[10]

9. Significant alternatives considered and rejected. In the course of this proceeding, petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission has attempted to accommodate the concerns expressed by these parties. In this order, the Commission is providing relief to small systems and low-price systems by terminating the requirement that such systems report both their adjusted transition rate and their full reduction rate on forms requesting external cost adjustments.

IV. Paperwork Reduction Act

10. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement

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[9] In light of pending petitions for reconsideration in this docket, the Commission retains jurisdiction to grant reconsideration on its own motion. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.108; *Central Florida Enterprises v. FCC*, 598 F. 2d 37, 48, n.51 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979); *Rebecca Radio of Marco*, 5 FCC Rcd 2913, 2914 n.8 (1990). *See also* Order, MM Docket No. 92-266, FCC 93-372, n. 1, summarized at 41 Fed. Reg. 41042 (August 2, 1993).

[10] 8 FCC Rcd 5631 (1993).

will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. Ordering Clauses

11. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612 and 623 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j). 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Order ARE ADOPTED.

12. IT IS FURTHER ORDERED that the revised reporting requirements adopted in this Order will become effective as soon as they may be approved by the Office of Management and Budget but not sooner than thirty days after publication of this ORDER in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission **FCC 95-154**
Washington, D.C. 20554

In re Application of	)	
	)	
Secret Communications Limited Partnership	)	
(Assignor)	)	
	)	
and	)	BALH-940429GF
	)	
Great American Television and Radio Company, Inc.	)	
(Assignee)	)	
	)	
For Assignment of License of WWNK-FM, Cincinnati, Ohio	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1995 **Released: April 19, 1995**

By the Commission:

1. The Commission has before it the above-captioned application for assignment of license of WWNK-FM, Cincinnati, Ohio from Secret Communications Limited Partnership ("Secret") to Great American Television and Radio Company, Inc. ("Great American"), and a related request for waiver of 47 C.F.R. § 73.3555(c), the Commission's one-to-a-market rule.[1] The application is unopposed. For the reasons stated below, we will grant the waiver request and the assignment application.

2. Great American is currently the licensee of WKRQ(FM) and WKRC-TV, Channel 12 (ABC), both licensed to Cincinnati, Ohio. The Commission granted Great American a permanent waiver to own both of these stations, as well as a co-located AM station, in

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[1] Section 73.3555(c) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station. See 47 C.F.R. § 73.3555(c).

1989.[2] By the instant application, Great American seeks to acquire a second FM station in the Cincinnati market. The transaction would comply with the Commission's revised radio ownership rules.[3] However, grant of the subject assignment application would create a new radio-television combination that requires waiver of the one-to-a-market rule under the "case-by-case" standard, discussed infra at paragraph 3.

3. Request for Waiver of the One-to-a-Market Rule. Great American bases its waiver request on the one-to-a-market standards enunciated in the Second Report and Order in MM Docket 87-7, 4 FCC Rcd 1741 (1989) ("Second Report and Order"), recon. denied in part and granted in part ("Second Report and Order Recon."), 4 FCC Rcd 6489 (1989). Under these standards, the Commission will "look favorably upon" waiver applications involving (1) stations serving the top 25 markets where at least 30 separately owned, operated, and controlled stations will remain following the proposed combination; or (2) "failed" stations (stations that have not been operational for a substantial period of time or are involved in bankruptcy proceedings). Otherwise, the applicants must be evaluated under the more rigorous case-by-case standard. 47 C.F.R. § 73.3555(c)

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[2] Great American assumed control of WKRC(AM), WKRQ(FM), and WKRC-TV in 1987 and was granted a temporary waiver to permit continued operation of the three stations. Taft Broadcasting Co., 2 FCC Rcd 6622 (1987). In 1989, after a detailed public interest showing, it was granted a permanent waiver. It subsequently sold WKRC(AM). See Great American Television and Radio Co., 4 FCC Rcd 6347 (1989). Great American demonstrates that the geographic area to be served by WWNK-FM, WKRQ, and WKRC-TV is similar to the geographic area of the previously approved combination of WKRC(AM), WKRQ(FM), and WKRC-TV. Moreover, according to Great American, the combined audience share of WWNK-FM and WKRQ is substantially lower than the combined audience share of WKRC(AM) and WKRQ at the time of the 1989 one-to-a-market waiver.

[3] The Commission's revised radio contour overlap rule, 47 C.F.R. § 73.3555(a), permits a single entity to own up to two AM and two FM commercial radio stations in a single market if there are 15 or more commercial radio stations in that market and the proposed combination does not lead to "excessive concentration in the local market." Excessive concentration will be presumed where the stations to be jointly owned have a combined audience share exceeding 25 percent. 47 C.F.R. § 73.3555(a)(1)(ii); In re Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), recon. granted in part and denied in part, 7 FCC Rcd 6387, 6393 (1992). Great American has demonstrated that there are more than 15 commercial radio stations within the Cincinnati metro market and the combined audience share of WWNK-FM and WKRQ is 10.3 percent.

note 7. Under this standard, the Commission makes a public interest determination based upon five criteria, though an applicant need not satisfy every criterion. See note 7, infra. The five criteria are: (1) the public service benefits that will arise from the joint operation of the facilities such as economies of scale, cost savings and programming and service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after joint operation is implemented. See Second Report and Order, 4 FCC Rcd 1741, 1753 (1989). Since the Cincinnati market is not in the top 25 markets and since neither of the stations involved is a "failed" station, Great American must justify its request under the "case-by-case" standard.

4. Benefits of Joint Operation. In support of its request, Great American submits a showing which addresses each of the five case-by-case factors. First, regarding the potential public service benefits of joint operation, Great American contends that significant cost savings, economies of scale, and technical, operational, programming, and service benefits will be realized if the Commission allows the proposed combination. Great American anticipates moving WWNK-FM's operations to Great American's headquarters and assimilating WWNK-FM into Great American's existing management and staffing structures. It estimates that combining the operations of WWNK-FM with those of WKRQ and WKRC-TV will clearly save in excess of $855,000 annually and believes that the total savings and benefits from joint operation may total over a million dollars annually.[4] Great American indicates that the consolidation of WWNK-FM with WKRQ and WKRC-TV will result in numerous programming benefits to the public. For example, WWNK-FM's news gathering capabilities will be greatly enhanced through access to Great American's existing news services and facilities. It will also have access to Great American's meteorologists and WKRC-TV's Doppler 12 Weather Center. Currently, WWNK-FM has no on-site weather service and no contract for outside weather reporting. Additionally, combined

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[4] Great American anticipates that the joint operation of WWNK-FM, WKRQ and WKRC-TV will result in estimated annual savings of $75,000 through group purchasing of insurance and advertising, $20,000 in combined telephone switchboard services, $75,000 in maintenance costs, $240,000 through the reduction of the promotion staff and budget, $100,000 in reduction of cross-promotional spots, $315,000 in salaries and related personnel costs, and $30,000 in combined engineering functions, for a total of $855,000. Further, Great American estimates a benefit of an additional $200,000 through the centralized management of all three stations.

operations will result in increased public service programming and non-broadcast public service efforts for WWNK-FM. In support of this point, Great American lists the numerous community projects and public interest campaigns it has been involved in during the last two years and indicates the intent to expand such efforts through WWNK-FM.[5]

5. Type of Facilities. WWNK-FM is a Class B FM station operating at 32 kw effective radiated power (ERP) from an antenna 183 meters height above average terrain (HAAT). WKRQ is a Class B facility operating at 16 kw ERP from 267 meters HAAT and WKRC-TV is an ABC-affiliated VHF television station operating on Channel 12 at 316 kw ERP and an antenna height of 305 meters HAAT. Great American, in support of its contention that the subject facilities do not dominate the market, asserts that WWNK-FM, WKRQ, and WKRC-TV operate with facilities that are substantially comparable to all other television stations and Class B FM stations in the Cincinnati market. Commission records confirm these assertions.

6. Number of Outlets Owned. The proposed combination will result in Great American owning two FM stations and one television station in the same market. Great American has demonstrated that there are at least 15 commercial radio stations that provide a principal community grade of service to the area defined by the combined principal community contours of WWNK-FM and WKRQ. It has also demonstrated that the combined audience share of stations WWNK-FM and WKRQ is 10.3 percent. See note 3, supra.

7. Economic Status. Great American concedes that "none of the stations here is in financial distress." Waiver Request at 27.

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[5] According to Great American, in the last two years it has been involved in community programs such as: "Neediest Kids of All", "AIDS Volunteers of Cincinnati", "Tag Team", "A Day in Eden", "Alzheimer's Association Memory Walk", "Frederick Douglass School", "Teaching Excellence Awards", "American Heart Association", "Boy Scout Jamboree", "Cincinnati Bengals Tickets Giveaways", "ABC Classroom Connection", "Salvation Army", "Making It in American", "Explorer Post 12", "Weather School", "Golden Galaxy", "Freestone FoodBank", "St. Rita School for the Deaf", "Tri-State Harvest Food for the Hungry", "Big Brothers and Big Sisters", "Celebrity Luncheon", "Workers Rehabilitation of Cincinnati", "Prom Promise Program", "Clean Cincinnati, Inc.", "Just Say No International", "Black History Month", "Easter Seals", "Muscular Dystrophy Association", "Family Success Consortium", "ABC's Children First Campaign", "Tornado Alert", "Profiles in Survival", "Antarctica, Sharks and Zoo Safari", "Captions", "Powerline", "Newsmakers", "Make Peace with Nature", "Health Matters", and many others. Waiver Request at 9-21.

Nonetheless, Great American emphasizes that this factor, i.e. presence of financial difficulties, "is not entitled to substantial weight when a strong showing has been made that the public interest would otherwise be served by grant of a waiver." Waiver Request at 27 (citing Great American Television and Radio Co., 4 FCC Rcd. at 6349).

8. Competition and Diversity in the Market. The fifth factor is the nature of the relevant market in light of the Commission's concerns about diversity and competition. To determine the number of broadcast outlets in the market the Commission considers the number of separately owned and operated "voices" and the degree of cable and other non-broadcast media penetration. As to the market definition within which to count the number of broadcast stations, in the context of a one-to-a-market waiver, we consider "the relevant TV metro market for radio stations and the relevant ADI [Arbitron Area of Dominant Influence] TV market for TV stations." Second Report and Order, 4 FCC Rcd at 1760, n.101. The Cincinnati ADI, which includes 771,000 television homes, is ranked 31st in the country and contains 9 television stations, licensed to eight separate owners. It contains 26 FM stations and 14 AM stations, for a total of 40 AM and FM stations, licensed to 33 separate owners. Great American also submits that the Cincinnati ADI has 8 daily newspapers, 61 weekly newspapers, and numerous national magazines with significant circulation. Great American also asserts that there are 28 cable operators and, as of March 1994, cable penetration in the Cincinnati market was 59 percent. Great American concludes that, due to the abundance of electronic and print media in the Cincinnati market, "[a]quisition by Great American of one additional radio station would have no discernable effect on either media diversity or competition in the Cincinnati market." Waiver Request at 8.

9. Discussion. In evaluating a request for a waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." Second Report and Order Recon., 4 FCC Rcd at 6491.[5] We conclude that Great American's showing in support of a waiver of the one-to-a-market rule meets our case-by-case criteria, and that a waiver in this instance is in the public interest and would not have an adverse effect on diversity and competition in the Cincinnati market.

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[5] We note that "[n]ot all of the factors mentioned will be relevant in every case." Second Report and Order Recon., 4 FCC Rcd at 6491, paragraph 18. See also South Central Communications Corporation, 5 FCC Rcd 6697, 6698 (1990)(all five criteria need not be satisfied as a precondition to grant of a waiver).

10. In the past, the Commission has held that significant cost savings and economic efficiencies are "precisely the type of public interest benefit from common station ownership which we envision as warranting a waiver of the one-to-a-market rule . . ." Great American Television and Radio Co., 4 FCC Rcd at 6349. Great American has shown that joint operation of the stations will result in cost savings of at least $855,000 dollars annually. It has also clearly demonstrated the potential for enhanced programming and other public service benefits for WWNK-FM if the assignment is approved. For example, the proposed combination will significantly strengthen WWNK-FM's news and weather reporting ability. It will also enable WWNK-FM to avail itself of Great American's resources and notable experience in public service programming and public interest campaigns.

11. Furthermore, Great American has demonstrated that the proposed combination will not create any undue concentration of ownership or control of the broadcast media in the Cincinnati market. After the assignment is approved, the Cincinnati market will be served by 40 radio stations and 9 television stations. Of those stations, 39 will remain separately owned and operated, with Great American owning two FM stations and one television station. In addition, as Great American has pointed out, other "voices" in the market are plentiful, including, inter alia, 8 daily newspapers, 61 weekly newspapers, and 28 cable operators. Cable penetration is 59 percent. With respect to the facilities involved, we note that the proposed combination does not present issues of market dominance inconsistent with the public interest given the substantial competition in the Cincinnati market. Thus, we are persuaded that the common ownership and joint operation of WWNK-FM, WKRQ, and WKRC-TV will not adversely affect diversity and competition in the Cincinnati market.

12. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(c), IS HEREBY GRANTED; and having found the applicants fully qualified, the application for assignment of license (BALH-940429GF) of WWNK-FM, Cincinnati, Ohio from Secret Communications Limited Partnership to Great American Television and Radio Company, Inc. IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FCC 95-156

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	GN Docket No. 93-252
Implementation of Sections 3(n) and 332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 10, 1995 **Released:** May 5, 1995

Comment Date: June 5, 1995
Reply Comment Date: June 26, 1995

By the Commission:

1. In this Third Further Notice of Proposed Rule Making, we propose to amend our 45 MHz spectrum cap for cellular telephone service, Specialized Mobile Radio (SMR) service, and broadband Personal Communications Service (PCS). While the spectrum cap currently applies only to licensees in these services who are classified as Commercial Mobile Radio Service (CMRS) providers, we propose to extend it to all cellular, SMR, and broadband PCS providers regardless of their regulatory classification. We also seek comment on applying the spectrum cap to those "grandfathered" SMR licensees who continue to be regulated as Private Mobile Radio Service (PMRS) providers until August 10, 1996.

2. When we initially proposed the spectrum cap in the *Further Notice of Proposed Rule Making* in this proceeding,[1] we framed the issue in terms of aggregation of CMRS

[1] *Further Notice of Proposed Rule Making*, GN Docket No. 93-252, 9 FCC Rcd 2863 (1994) (*Further Notice*).

spectrum, and did not address aggregation of PMRS spectrum.[2] In the *Further Notice* we proposed a broad-based spectrum cap covering all CMRS, or alternatively, a more limited cap that would apply to CMRS providers in specified services only, *i.e.*, cellular, SMR, and broadband PCS.[3] We did not address the issue of whether licensees in these services providing Private Mobile Radio Service (PMRS) should also be subject to the cap. On August 9, 1994, in the *Third Report and Order* in this proceeding, we applied the cap only to cellular, SMR, and broadband PCS services.[4] As adopted, the cap was limited to cellular, SMR, and broadband PCS licensees whose activities are regulated as CMRS.[5]

3. Because the spectrum cap is limited to CMRS providers in the three affected services, it leaves open the possibility that licensees could avoid the cap by providing PMRS as opposed to CMRS offerings.[6] We question whether the applicability of the spectrum cap should turn on the CMRS/PMRS distinction, however. In the *Third Report and Order*, we concluded that a cap was needed for cellular, SMR, and broadband PCS because of the potential for licensees to aggregate large amounts of spectrum in these services, thereby limiting the availability of spectrum to other competitors in the mobile services market.[7] We note that this potential for a licensee to reduce the number of competitors by aggregating spectrum exists regardless of whether the licensee is providing CMRS or PMRS. Moreover, the services provided by PMRS providers may well be viewed as competitive alternatives to CMRS by customers; thus, excluding them from the cap could provide PMRS providers with an unfair competitive advantage over CMRS providers. Finally, even if most cellular, SMR, and broadband PCS providers provide CMRS services, as is likely to be the case, determining the precise amount of CMRS spectrum that should be attributed for spectrum cap purposes is likely to be difficult, particularly in the case of PCS, SMR, and possibly cellular licensees who provide both CMRS and PMRS offerings under a single authorization.

4. For all of these reasons, we propose that the 45 MHz spectrum cap be revised to apply to all cellular, SMR, and broadband PCS licensees regardless of regulatory

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[2] CMRS is defined as any service that is: (1)(A) provided for profit; (B) an interconnected service; and (C) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (2) the functional equivalent of such a mobile service described in paragraph (1). PMRS is defined as a mobile service that is neither a commerical mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service. *See* 47 C.F.R. § 20.3.

[3] *Id.*, paras. 92-96.

[4] *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*Third Report and Order*).

[5] *Id.*, para. 263.

[6] SMR and PCS licensees may already offer non-CMRS services. Cellular licensees may not currently offer non-CMRS services, although several pending petitions for reconsideration of the *Second Report and Order* in this docket urge the Commission to lift this restriction.

[7] *Third Report and Order*, paras. 258-260.

classification. We believe that such a revision will greatly simplify the application of the cap and will provide greater certainty regarding its effect to cellular, SMR, and broadband PCS applicants and licensees. We seek comment on this proposal. Moreover, in light of our proposal, we seek comment on whether there is any need to delay the applicability of the spectrum cap until August 10, 1996 for "grandfathered" SMR licensees, who will continue to be regulated as PMRS providers until that time. When we adopted the CMRS-only spectrum cap in the *Third Report and Order*, we stated that this issue warranted further examination.[8] If we decide to extend the cap to SMR licensees classified as PMRS, however, this rationale for delaying the applicability of the cap to grandfathered SMR licensees appears not to apply.[9] We seek comment on this analysis.

5. **Initial Regulatory Flexibility Analysis.** We certify that the Regulatory Flexibility Act of 1980 does not apply to this proceeding. Any action taken as a result of this *Third Further Notice of Proposed Rule Making* is unlikely to have a significant economic effect on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act, because the proposed change is minor and because entities that acquire 45 MHz of spectrum in a given geographic market are unlikely to be small businesses. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

6. ***Ex Parte* Rules - Non-Restricted Proceeding.** This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

7. **Comment Dates.** Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 5, 1995, and reply comments on or before June 26, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239,

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[8] *Third Report and Order*, para. 283.

[9] Applying the spectrum cap to grandfathered SMR licensees would not require them to divest current license holdings or prevent them from seeking to obtain PCS licenses in the upcoming auctions. In the *Third Report and Order*, we stated that SMR licensees who exceeded the spectrum cap by acquiring broadband PCS licenses would not be required to divest until after the auction (within ninety days of the license grant). *See Third Report and Order*, paras. 283-285. 47 CFR § 20.6(e).

1919 M Street, N.W., Washington, DC 20554.

8. For further information about this *Notice*, contact Lisa Warner, Legal Branch, Commercial Radio Division, Wireless Telecommunications Bureau, (202) 418-0620.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FCC 95-159

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

SECOND REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 14, 1995 Released: April 17, 1995

Comment Date: May 24, 1995
Reply Comment Date: June 1, 1995

By the Commission: Commissioner Barrett concurring and issuing a statement.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION 1

II. EXECUTIVE SUMMARY 2-23

III. BACKGROUND 24-28

IV. SECOND REPORT AND ORDER
A. SERVICE RULES
1. Overview 29-30
a. Service Area 31-35
b. Channel Blocks 36-37

2. Coverage Requirements 38-43
3. Treatment of Incumbents 44-47
4. Field Strength Limit at the MTA Boundary 48-49
5. Secondary Sites 50-53
6. Loading Requirements 54-59
7. Emission Masks 60-61
8. Mexican/Canadian Border Areas 62-63
9. Discontinuance of Operation 64-65
B. MISCELLANEOUS MATTERS
1. Spectrum Cap and Attribution 66-68
2. Grandfathering 69-71

V. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING
AUCTION RULES
A. Competitive Bidding 72-78
1. Competitive Bidding Design for 900 MHz SMR 73-75
2. License Grouping 76-78
B. Bidding Issues 79-96
1. Bid Increments 79-80
2. Stopping Rules 81-85
3. Duration of Bidding Rounds 86
4. Activity Rules 87-93
5. Rules Prohibiting Collusion 94-96
C. Procedural and Payment Issues 97-121
1. Pre-Auction Application Procedures 97-104
2. Amendments and Modifications 105-106
3. Upfront Payments 107
4. Down Payments and Full Payments 108-110
5. Bid Withdrawal, Default, and Disqualification 111-115
6. Long-Form Applications 116
7. Petitions to Deny and Limitations on Settlements 117-118
8. Transfer Disclosure Requirements 119-120
9. Performance Requirements 121
D. Treatment of Designated Entities 122-147
1. Overview and Objectives 122-128
2. Bidding Credits 129-132
3. Reduced Down Payments/Installment Payments 133-134
4. Eligibility for Bidding Credits, Installment Payments and Reduced

Down Payments 135-140
5. Transfer Restrictions and Unjust Enrichment Provisions . . 141-143
6. Rural Telephone Company Partitioning 144-145
7. Other Provisions 146-147

VI. CONCLUSION 148

VII. PROCEDURAL MATTERS
A. Regulatory Flexibility Act 14-153
B. Ex Parte Rules -- Non-Restricted Proceeding 154
C. Comment Dates 155
D. Ordering Clauses 156-158
E. Contact Person 159

APPENDIX A -- FINAL RULES

APPENDIX B -- PROPOSED RULES

APPENDIX C -- INITIAL REGULATORY FLEXIBILITY ANALYSIS

APPENDIX D -- PETITIONERS AND COMMENTERS

I. INTRODUCTION

1. In this *Second Report and Order and Second Further Notice of Proposed Rulemaking,* we adopt final service rules, and request comment on auction rules that will enable us to complete the licensing of the 900 MHz Specialized Mobile Radio (SMR) service. The *Further Notice* requests comment on further aspects of the Commission's decision in the *Third Report and Order* inGN Docket No. 93-252[1] (*CMRS Third Report & Order*), to license the 900 MHz band on an MTA basis, and to use competitive bidding to select from among mutually exclusive applicants. We establish technical and operational rules for the new MTA licensees, and also define the rights of incumbent SMR licensees already operating in the 900 MHz band. We set forth proposals for new licensing rules and auction procedures for the service, including provisions for designated entities. These proposed rules will serve our twin goals of providing service to the public expeditiously, and allowing the marketplace to respond to consumer demands. The rules adopted and policies set forth and proposed herein will promote competition, while allowing incumbents to continue to pursue their business plans. Finally, we address issues raised on reconsideration of the *CMRS Third Report &*

[1] Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988 (1994) (*CMRS Third Report & Order*).

Order pertaining specifically to the 900 MHz SMR service.[2]

II. EXECUTIVE SUMMARY

2. The following paragraphs summarize the principal decisions made in this Order regarding service rules, and the proposals in the Further Notice concerning auction rules.

A. Second Report and Order: Service Rules

3. As decided in the *CMRS Third Report & Order*, the 900 MHz SMR band will be divided into 20 ten-channel blocks in each of 51 service areas based on Major Trading Areas (MTAs), which match the blocks previously licensed for the Designated Filing Areas ("DFAs"). Each MTA license will give the licensee the right to operate throughout the MTA on the designated channels except where a co-channel incumbent licensee already is operating. MTA licensees also will be allowed to aggregate multiple blocks within an MTA and to aggregate blocks geographically in multiple MTAs.

4. MTA licensees in this service will be required to meet coverage requirements in their service areas. Specifically, we require coverage of 1/3 of the population in the service area within three years of the initial license grant and 2/3 of the population within five years. Alternatively, a licensee may make a showing at five years that it is providing "substantial service." In evaluating such showings, the Commission may consider such factors as whether the licensee offers a service that covers multiple MTAs or is offering an otherwise specialized or technologically sophisticated service that does not require ubiquitous coverage to be of benefit to customers. MTA licensees must satisfy these requirements regardless of the area or percentage of the MTA population that is served by incumbent licensees. As we have provided in the broadband PCS service, licensees may resell spectrum within their service area, provided that use of the spectrum remains subject to the licensee's ultimate control. We believe that allowing such resale will encourage provision of service to small markets and rural areas, which will help licensees to fulfill coverage requirements, and will promote the most efficient use of the spectrum.

5. In order to ensure that incumbent licensees receive protection from interference by MTA licensees, the Order provides that MTA licensees either must maintain a minimum 113 kilometer (70 mile) geographic separation or comply with our short-spacing rules with respect to all incumbent facilities in their service area or in adjacent MTAs. We also give incumbents the flexibility to modify or add facilities within their existing service areas so long as they do not expand coverage beyond their existing 40 dBu signal strength contour.

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[2] Petitions for Reconsideration of the *CMRS Third Report & Order* that raise general CMRS issues, or specific issues pertaining to other CMRS services, will be addressed in a separate Order.

6. With respect to co-channel interference between adjacent MTA licensees, MTA licensees will not be permitted to exceed a signal level of 40 dBuV/m at their service area boundaries, and we will require coordination of frequency usage between co-channel adjacent MTA licensees and incumbents. Also, we will apply emission mask rules (rules that restrict transmitter emissions on the spectrum adjacent to the licensee's adjacent channel) to the "outer" MTA channels in each block (*i.e.*, the channels on the outer edges of the MTA licensee's channel block) and to any "interior" MTA channels that are adjacent to those used by incumbent licensees (*i.e.*, the channels inside of the MTA licensee's channel block assignment that are adjacent to other licensees).

7. We partially reconsider our decision in the *CMRS Third Report & Order* to grant primary site protection only to 900 MHz secondary site authorizations that were granted on or before August 9, 1994. In this Order, we also extend primary site protection to secondary sites for which applications were filed on or before August 9, 1994 but which were granted after that date. We deny reconsideration, however, of our decision in the *CMRS Third Report & Order* with respect to loading requirements in the 900 MHz service. Consequently, incumbent 900 MHz SMR licensees will continue to be subject to our prior loading requirements, although they are eliminated for MTA licensees.

8. Although some 900 MHz channels are not available in Mexican and Canadian border areas, we will use the same channel block allocation for MTA licensees in these areas as in other parts of the country. Licensees whose MTAs include border areas may use only the channels in their block only to the extent that such channels are available to United States licensees pursuant to international agreement.

9. We also modify our rule regarding discontinuance of operation to conform with the standard in § 22.317, which allows a licensee to discontinue operations for 90 continuous days with notification to the Commission.

B. Second Further Notice of Proposed Rulemaking

1. Auction Rules

10. A total of 1,020 MTA licenses (51 MTAs times 20 licenses in each MTA) will be awarded in the 900 MHz SMR service. In this Further Notice, we tentatively conclude that we will use a single simultaneous multiple round auction to award these licenses, because the licenses are interdependent, and licensees likely will aggregate and/or substitute across spectrum blocks and geographic areas. We reserve the discretion, however, to hold more than one auction, and to issue a public notice to notify applicants, if we determine that a single auction is administratively unworkable. Both incumbents and new entrants would be eligible to bid for all MTA licenses without restriction. All applicants for MTA licenses would be treated as initial applicants for public notice, application processing, and auction purposes. The Wireless Telecommunications Bureau would announce the time and place of the auction and provide additional information to bidders by future public notice.

11. As proposed, applicants would apply for the 900 MHz SMR auction by filing a short-form application (FCC Form 175) and paying an upfront payment. We propose adoption of the standard upfront payment formula of $0.02 per pop-MHz, based on the number of 10-channel blocks in each MTA identified on the applicant's Form 175 and the total MTA population regardless of incumbent coverage. We also propose adoption of the Milgrom-Wilson activity rule used in previous multiple-round simultaneous auctions, which requires bidders to declare their maximum eligibility in terms of MHz-pops and limits them to bidding on licenses encompassing no more than the MHz-pops covered by their upfront payment.

12. As proposed, each applicant would be required to specify on its Form 175 its classification, status as a designated entity (if applicable), markets and frequency blocks applied for, and persons authorized to place or withdraw bids. Applicants would have to identify any arrangements or agreements with other parties relating to the licenses that are being auctioned, and certify that there are no arrangements other than those specified. Applicants would be able to correct minor defects in their short-form applications prior to the auction, but could not make any major modifications to their applications, including market changes, cognizable ownership changes or changes in the identification of parties to bidding consortia, until after the auction. However, applicants could modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. In instances where only a single applicant has applied for a particular MTA channel block, the Commission would cancel the auction for that block and establish a deadline for filing of the applicant's long-form application. In all instances where mutually exclusive applications are filed, the MTA channel block would be included in the auction.

13. As proposed, the timing and duration of auction rounds would be determined by the Wireless Telecommunications Bureau and announced by public notice. As in prior auctions, we expect to start the auction with relatively large bid increments and reduce increments as bidding activity falls. We also propose adoption of a simultaneous stopping rule for this auction to afford bidders flexibility to pursue back-up strategies to ensure that bidders will not hold back bids until the final round. During the auction, we retain the discretion to declare that the auction will end after a specified number of additional rounds.

14. We also propose to specify bid increments, *i.e.*, the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period of time and is expressed in both a percentage and fixed dollar amount. Under this proposal, we may impose a minimum bid

increment of five percent or $0.02 per pop-MHz, whichever is greater,[3] but we also retain the discretion to set, and by announcement before or during the auction, vary the minimum bid increments for licenses over the course of an auction.

15. We propose adoption of the bid withdrawal and default rules for this auction similar to those used in prior auctions. Under these rules, any bidder that withdraws a high bid during an auction before the Commission declares bidding closed must reimburse the Commission for the difference between the amount of the ultimate winning bid and the withdrawn bid if the winning bid is lower than the withdrawn bid. An auction winner defaulting after the close of the auction would also have to pay the lesser of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid. In the event that an auction winner defaults, is disqualified, or if the license is revoked or terminated, the Commission would re-auction the license, except that the Commission may offer the license to the second highest bidder if the default occurs within five days after the auction closes.

16. At the conclusion of the auction, winning bidders would be required to supplement their upfront payments and file their long-form applications (FCC Form 600). The upfront payment would have to be supplemented in an amount sufficient to bring the winning bidder's deposit up to 20 percent of its winning bid within five days after the close of the auction. Designated entities eligible for installment payments, however, would have to bring their deposits up to five percent of the winning bid within five days after the close of the auction. Once each applicant has filed its long form and submitted its down payment, the Wireless Bureau would issue a public notice announcing the application's acceptance for filing and opening a 30-day window for filing of petitions to deny.

17. As we propose, the 900 MHz SMR auction would be subject to the same regulatory safeguards as prior auctions to prevent applicants from colluding during the auction or obtaining unjust enrichment from subsequent transfer of the license. To prevent collusion, bidders who have applied for licenses in the same geographic area on their short forms may not cooperate, collaborate, discuss, or disclose the substance of their bids or strategies with other bidders during the auction except pursuant to a consortium or arrangement identified in the short-form application. Bidders would also have to attach an exhibit to the Form 600 explaining the terms, conditions, and parties involved in any bidding arrangement. With respect to transfers, licensees transferring their licenses within three years of the initial license grant would have to disclose to the Commission all contracts and other documentation associated with the transfer.

2. Designated Entities

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[3] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) at ¶ 44 (*Auctions Fifth Report & Order*).

18. Because of the large number of available licenses and the presence of incumbents throughout the 900 MHz SMR band, we state our tentative conclusion not to create an entrepreneurs' block in this service. However, we request comment on whether the capital requirements of the service may be so substantial that we should insulate certain blocks from large bidders to provide opportunities for designated entities.

19. Nevertheless, we propose to adopt several provisions for bidding in the 900 MHz auction by designated entities. Under our tentative conclusion, small businesses, including small businesses owned by women and minorities, would be eligible for a ten percent bidding credit on any MTA license. Under this proposal, small businesses would be allowed to make a reduced down payment (five percent of the winning bid following the close of the auction, with the balance of the down payment to be paid five days after the license grant), and would also be entitled to pay the bid balance in installments over the remaining license term.

20. We believe that broadening the scope of opportunities for very small businesses has the potential to result in substantial participation by women and minorities, and we believe that the expected capital outlay for the 900 MHz service will not present the same type of obstacles for those entities as a more costly spectrum-based service like PCS. However, we request comment on the projected costs associated with acquisition, construction and operation of 900 MHz MTA licenses, and the extent of participation of women-owned and minority-owned entities in the current 900 MHz SMR service. We also request comment on whether we should adopt separate provisions for women-owned and minority-owned entities.

21. We tentatively conclude that reduced upfront payments for designated entities are unnecessary in the 900 MHz service, but request comment on that tentative conclusion. Finally, we propose adoption of partitioning rules for rural telephone companies similar to those that we have applied to broadband PCS.

22. For purposes of determining eligibility for the small business provisions we propose for the 900 MHz SMR service, we propose to define a small business as an entity that, together with affiliates, has average gross revenues for the three preceding years of less than $3 million. We also propose to use the 25 percent attribution threshold and affiliation rules applicable to PCS. For purposes of determining eligibility for minority-owned and women-owned entities, if we adopt separate provisions for such entities, we propose to use the definition contained in Section 1.2110(b)(2) of the Commission's rules.

23. We tentatively conclude that designated entities entitled to special provisions in the 900 MHz SMR service will be subject to restrictions on transfer or assignment of their licenses. During the first three years of the license term, those entities may not transfer or assign their licenses to anyone, and transfers will be limited to other designated entities during the fourth and fifth year. If the assignee is not eligible for the same provisions, the small business would reimburse the government for the amount of the bidding credit before transfer of the license would be permitted.

III. BACKGROUND

24. The 900 MHz SMR service was established in 1986, when the Commission allocated 200 channel pairs in the 896-901 MHz and 935-940 MHz bands for SMRs in order to alleviate congestion in the 800 MHz SMR band.[4] To expedite service in major markets where demand for SMR service was greatest, the Commission elected to use a two-phase licensing process. In Phase I, licenses were assigned in 46 "Designated Filing Areas" (DFAs) comprised of the top 50 markets. Following Phase I, the Commission envisioned licensing facilities in areas outside these markets in Phase II. In the meantime, however, licensing outside the DFAs was frozen after 1986, when the Commission opened its filing window for the DFAs.[5]

25. In 1989, the Commission adopted a *Notice of Proposed Rule Making* in PR Docket 89-553,[6] proposing to begin Phase II licensing of SMR facilities nationwide. The *NPRM* contained proposals intended to add flexibility to SMR systems. The Commission continued its freeze on licensing outside the DFAs while the rulemaking was pending, but some DFA licensees elected to become licensed for secondary sites (*i.e.*, facilities that may not cause interference to primary licensees and must accept interference from primary licensees) outside their DFAs to accommodate system expansion.

26. In 1993, the Commission adopted a *First Report & Order and Further Notice of Proposed Rulemaking* in PR Docket 89-553,[7] modifying its Phase II proposal and seeking

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[4] Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, GEN Docket No. 84-1231, Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations To Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, GEN Docket No. 84-1233, Amendment of Parts 2, 22, and 25 of the Commission's Rules To Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, GEN Docket No. 84-1234, *Report and Order*, 2 FCC Rcd 1825 (1986) (*900 MHz SMR Report & Order*).

[5] Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, rel. Nov. 4, 1986, 1 FCC Rcd 543 (1986) (Public Notice of Nov. 4, 1986).

[6] Amendment of Parts 2 and 90 of the Commission's rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Notice of Proposed Rulemaking*, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

[7] Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *First Report and Order and Further Notice of*

comment on whether to license the 900 MHz SMR band to a combination of nationwide, regional, and local systems. Shortly after the *First Report &Order/Further Notice*, Congress amended the Communications Act to reclassify most SMR licensees as Commercial Mobile Radio Service (CMRS) providers and establish the authority to use competitive bidding to select from among mutually exclusive applicants for certain licensed services.[8] Accordingly, the Commission deferred further consideration of Phase II and incorporated the 900 MHz docket (as well as the companion docket relating to 800 MHz SMR)[9], into its *CMRS* proceeding to ensure that the regulation of all SMRs would be consistent with the regulation of competing CMRS services such as cellular and PCS[10] and to consider the impact of auction authority on the record of the pending 900 MHz proceeding.[11]

27. In the *CMRS Third Report & Order*, the Commission further revised its Phase II proposals and established the broad outlines for the completion of licensing in the 900 MHz SMR band. The Commission concluded that (1) the 900 MHz SMR band would be licensed in 20 ten-channel blocks using MTAs as service areas; (2) licensing of mutually exclusive applicants for this spectrum would be based on competitive bidding; (3) incumbent licensees in the band would retain the right to operate under their existing authorizations, but would be required to obtain the relevant MTA license (or obtain the consent of the MTA licensee) to be able to expand their systems.[12] The Commission noted that some licensees had been granted authorizations to construct facilities outside of the DFAs, so they could link facilities in

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Proposed Rulemaking, PR Docket No. 89-553, 8 FCC Rcd 1469 (1993) (*Phase II First Report & Order & Further Notice*).

[8] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (Budget Act), § 6002(b), 107 Stat. 312, 392 (1993) (to be codified at 47 U.S.C. § 332).

[9] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Further Notice of Proposed Rulemaking*, PR Docket No. 83-144, FCC 94-271, rel. Nov. 4, 1994, 59 Fed. Reg. 60,111 (Nov. 22, 1994)(*800 MHz Further Notice*).

[10] *See* Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411 (1994) (*CMRS Second Report & Order*); *CMRS Third Report &Order*, 9 FCC Rcd 7988 (1994).

[11] Due to the passage of the Budget Act, the issues raised in the 1993 *Phase II First Report & Order*, (*e.g.*, primary status of secondary sites; license terms, eligibility for nationwide or regional licenses; limitation on number of licenses controlled by single licensee), were addressed in the *CMRS Third Report & Order*.

[12] *CMRS Third Report & Order* at ¶ 119.

different markets. With respect to those unprotected sites (*i.e.*, "secondary sites"),[13] the Commission stated that those that were licensed on or before August 9, 1994, would be entitled to primary site protection.[14] The Commission also eliminated loading requirements for future MTA licensees, but retained them for incumbent 900 MHz SMR licensees that do not obtain MTA licenses.[15]

28. While the *CMRS Third Report & Order* established the framework for 900 MHz licensing, the Commission left the adoption of specific auction and service rules for the Phase II *Order*. Various parties filed for reconsideration of the *CMRS Third Report and Order* and made *ex parte* presentations concerning, *inter alia*, secondary sites, loading requirements, treatment of incumbents *vis a vis* the MTA licensees, coverage requirements, and auction designs. Those petitions relating specifically to the 900 MHz SMR service will be considered here.

IV. SECOND REPORT AND ORDER

A. SERVICE RULES

1. Overview

29. Unlike the 800 MHz SMR band, the 900 MHz SMR band is lightly occupied, due to the fact that we have licensed the twenty 10-channel 900 MHz spectrum blocks only within the immediate vicinity of the top 50 markets in the country. We allocated 200 channel pairs (12.5 kHz per channel) in the 900 MHz band for the SMR service in 1986 and established a two-phase process for licensing these channels.[16] Phase I licensing began in 1987 and was completed in 1992 within the 46 "Designated Filing Areas'' (DFAs) representing the top 50 markets in the nation. Twenty licenses were authorized within each DFA. Currently, all 20 channel blocks are licensed for the 900 MHz SMR service in only nine of the top markets.[17] Furthermore, since these initial licenses were awarded in 1987, we have cancelled a significant percentage of licenses for failure to timely construct and place their systems in operation, additionally increasing the availability of channel blocks in the 900 MHz SMR

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[13] *See* 47 C.F.R. § 90.7 (defining "secondary operation").

[14] *CMRS Third Report & Order* at ¶ 119.

[15] *Id.* at ¶ 194.

[16] *See 900 MHz SMR Report & Order*, 2 FCC Rcd 1825 (1986).

[17] The nine DFA markets in which all channel blocks are currently licensed are: New York, Los Angeles, San Francisco, Houston, Dallas/Fort Worth, Miami, Boston, San Diego, and Washington, D.C./Baltimore. Substantial numbers of channel blocks are available in several of the top 50 markets, including Chicago, Philadelphia, and Detroit.

service.

30. Based on our view of actual and potential competition in the CMRS market, we determined in the *CMRS Third Report & Order* that our channel assignment and service area rules for 900 MHz SMR service, like those for 800 MHz, would be comparable to those of cellular and PCS to the extent practical. Although only 5 MHz of spectrum is available in the 900 MHz band, we stated our belief that this service presents significant opportunities for the development of certain types of wide-area mobile voice and data services that could compete with these other services.[18] In addition, the limited amount of prior licensing at 900 MHz makes implementation of wide-area licensing throughout pre-defined geographic areas considerably simpler than at 800 MHz, where extensive licensing has already occurred.

a. Service Areas

31. In the *CMRS Third Report & Order*, we decided to use MTAs as the service area for future 900 MHz SMR licensing. We concluded that the limited success of existing 900 MHz systems confined to providing service in DFAs argued against the use of more numerous BTAs or similarly small service areas, which are not substantially larger (and are in some cases smaller) than DFAs in most major markets. We found that MTA licensing was more likely to create opportunities for both existing licensees and new entrants to meet customer demands for wide-area service. We also concluded that using MTAs was preferable to using larger regional service areas or licensing on a nationwide basis, because use of these larger service areas could restrict unnecessarily entry into the 900 MHz market to a very small number of licensees. We found that use of MTAs for licensing of 900 MHz services would promote greater opportunities for entry without foreclosing the possibility of geographic consolidation, subject to Commission review and approval.[19]

32. We note that Rand McNally & Company is the copyright owner of the MTA Listings, which list the counties contained in each MTA, as embodied in Rand McNally's Trading Area System MTA Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide* (the "MTA Map.")[20] At the time of the *CMRS Third Report & Order*, Rand McNally had licensed the use of its copyrighted MTA/BTA Listings and maps for certain services such as PCS and 800 MHz SMR, but had not concluded such an agreement for 900 MHz SMR users.[21] On reconsideration of the *CMRS Third Report and Order*, Rand McNally requested that the Commission refrain from adopting the use of MTAs as the geographic boundaries for the 900 MHz SMR service, as it

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[18] *CMRS Third Report & Order* at ¶ 113.

[19] *Id. at* ¶¶ 114-115.

[20] *CMRS Third Report & Order* at n.218.

[21] *Id.* at nn.197, 218.

had not licensed its MTA Listings in connection with that service.[22]

33. Since that time, however, an agreement in principle for a blanket copyright license has been reached between Rand McNally and the American Mobile Telecommunications Association ("AMTA").[23] This license agreement would authorize the conditional use of Rand McNally's copyrighted material in connection with the 900 MHz SMR service. This agreement would require interested persons using the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally's ownership. Grantees of 900 MHz SMR ten-channel block MTA licenses would obtain a license to use Rand McNally's copyrighted material pursuant to the Rand McNally/AMTA license agreement upon payment to Rand McNally of $125.00 per each ten-channel block MTA license a grantee obtains.

34. The MTA Listings, the MTA Map and the draft Rand McNally/AMTA license agreement are available for public inspection at the Wireless Telecommunications Bureau's public reference room, Room 628, 1919 M Street N.W. Washington D.C. 20554. Copies of the foregoing also can be obtained by contacting Kim McLean, Marketing Coordinator, Rand McNally & Company, 8255 North Central Park, Skokie, Illinois 60076 (telephone: (800) 333-0134) or the American Mobile Telecommunications Association, 1150 18th Street N.W., Suite 250 Washington D.C. 20036 (telephone: (202) 331-7773).

35. We have been informed by the parties that grantees who do not wish to take part in the Rand McNally/AMTA license agreement are free to negotiate their own licensing arrangement with Rand McNally. In any event, it is important to emphasize that a 900 MHz SMR MTA license grantee who does not obtain a copyright license (either through the Rand McNally/AMTA license agreement or some other arrangement with Rand McNally) from Rand McNally for use of the copyrighted material may not rely on grant of an MTA-based SMR license from the Commission as a defense to any claim of copyright infringement brought by Rand McNally against such grantee. In view of the foregoing, we fully expect that Rand McNally and AMTA will finalize their license agreement and, accordingly, we deny Rand McNally's petition for reconsideration.

b. Channel Blocks

36. The 900 MHz SMR band is comprised of 20 blocks of 10 contiguous channels each, interleaved with channels assigned to other Part 90 services. In the *CMRS Third Report & Order*, we concluded that in light of the flexibility conferred by our ability to use auctions, each 10-channel block would be separately licensed and that applicants would be permitted to

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[22] Rand McNally & Company Petition for Reconsideration, filed Oct. 24, 1994.

[23] *See* Letter to William F. Caton, Acting Secretary, FCC, from Daniel S. Goldberg, Esq., Jan. 19, 1995.

aggregate blocks.[24] We also concluded that we would not restrict eligibility for any channel block, and that it would be appropriate to allow both incumbents and new entrants to bid without restriction for one or more 900 MHz blocks.[25] Eligibility is limited only by the overall 45 MHz aggregate CMRS spectrum cap, as discussed at ¶¶ 66-68, *infra*.[26]

37. Consistent with the flexibility granted to cellular and PCS licensees, MTA licensees on 900 MHz channels will be authorized to construct stations anywhere in their MTAs on unoccupied channels that are available for construction.[27] The MTA license will allow a licensee to expand or modify facilities throughout its service area without prior Commission approval, so long as the system continues to be in compliance with our technical and operational rules and protects incumbents, but the licensee will be required to notify the Commission of such changes.

2. Coverage Requirements

38. In the *CMRS Third Report & Order*, we concluded that 900 MHz MTA licensees should be subject to construction requirements similar to those established for other wide-area CMRS licensees such as cellular and broadband PCS.[28] Specifically, we provided 900 MHz MTA licensees five years to construct and operate their systems. We also concluded in the *CMRS Third Report & Order* that 900 MHz wide-area SMR licensees should be subject to interim coverage requirements that are similar to those in the cellular and PCS rules.[29] We deferred establishing specific coverage requirements for these systems, however, until the completion of this 900 MHz Phase II proceeding.

39. RAM and Geotek have proposed that 900 MHz MTA licensees provide coverage to one-fourth of the population of their service area within three years of initial license grant and to one-third of the population of their service area within five years.[30] They argue for a less stringent coverage requirement than that proposed for the 800 MHz service on the

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[24] *CMRS Third Report & Order* at ¶ 116.

[25] *Id.*

[26] *See id.* at ¶ 263.

[27] *Id.* at ¶ 117.

[28] *Id.* at ¶ 182.

[29] *Id.*

[30] RAM/Geotek Joint *Ex Parte* Presentation, filed Feb. 6, 1995, at 2.

grounds that there has not been as much buildout in the 900 MHz service[31] and because current applications of 900 MHz SMR are primarily specialized services for businesses that do not require ubiquitous coverage.[32]

40. We will require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of the population of their service area within five years. Alternatively, at the five year mark, MTA licensees may submit a showing to the Commission demonstrating that they are providing substantial service. This requirement fits squarely between our 10 MHz broadband PCS rules, which require coverage to one-fourth of the population of the licensee's service area within five years, or alternatively, to submit a showing to the Commission that a licensee is providing substantial service,[33] and our narrowband PCS rules, which require coverage of one-fourth of the population within five years, and three-fourths of the population within 10 years.[34] We will also follow the model in broadband PCS, by allowing licensees to resell spectrum within their service area, provided that use of the spectrum remains subject to the licensee's ultimate control. We believe that allowing such resale will encourage provision of service to small markets and rural areas, which will help licensees to fulfill coverage requirements, and will promote the most efficient use of the spectrum.[35]

41. While current 900 MHz services may be used primarily for specialized business uses, there may be some MTA licensees who seek to provide ubiquitous wide-area service to the public for uses that we have not yet anticipated. Therefore, we believe that this coverage requirement is reasonable and attainable for 900 MHz MTA licensees while also serving as a suitable deterrent to competitors who may seek to obtain MTA licenses for anti-competitive warehousing rather than for service to the public. We also conclude that a showing of "substantial service" is appropriate for 900 MHz because several current offerings in this band are cutting-edge niche services. Moreover, it is more difficult for a 900 MHz MTA licensee who aggregates only a total of 5 MHz of spectrum, to provide the ubiquitous coverage that a 30 MHz broadband PCS licensees may contemplate.[36] Thus, we believe that 900 MHz MTA

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[31] RAM *Ex Parte* Presentation, filed Dec. 19, 1994, at 4.

[32] *Id.* at 2, 4.

[33] *See* 47 C.F.R. § 24.203(b).

[34] *See id.* § 24.103(c).

[35] *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, GEN Docket No. 90-314, 9 FCC Rcd 4957 (1994) at ¶ 157.

[36] Broadband PCS licensees in the 30 MHz band are required to provide coverage to 1/3 of the population of their service area within five years, and 2/3 of the population within 10

licensees should be held to a stricter coverage standard than is proposed by RAM and Geotek, but not as stringent as the 30 MHz broadband requirements.

42. Additionally, we noted in the *CMRS Third Report & Order* that any interim coverage requirements for MTA SMR systems must account for the fact that MTA licensees must provide co-channel protection to incumbent systems in their service area.[37] As discussed at ¶¶ 44-47, *infra*, 900 MHz MTA licensees will be required to protect incumbent SMR systems. We believe that when a licensee acquires an MTA license, it must assume the responsibility of obtaining the right to use sufficient spectrum to provide coverage if such spectrum is not already available. This responsibility may be achieved either directly (by utilizing available spectrum authorized to the MTA licensee or acquiring such spectrum through buyouts of incumbent licensees within its authorized MTA block) or indirectly (through resale or other leasing agreements with incumbents). Thus, an MTA licensee must satisfy its coverage requirements regardless of the extent of the presence of incumbents within its MTA block. We believe that this will also serve to discourage applicants who have a limited ability to provide coverage within an MTA from seeking MTA licenses for anti-competitive reasons, *e.g.*, to block potential acquisition of the MTA license by an applicant who already provides substantial coverage in the MTA.

43. The imposition of interim coverage requirements also raises the issue of the consequences of the MTA licensee's failure to meet such requirements. We conclude that an MTA licensee's failure to meet the coverage requirements imposed at either the third or fifth years of its construction period, or to make a convincing showing of substantial service at the five-year mark, will result in forfeiture of the entire MTA license. This penalty for failure to comply with construction requirements is consistent with the penalties provided in our PCS rules.[38] Additionally, such action would allow the spectrum to be made available to other qualified applicants who could provide service to the public.

3. Treatment of Incumbents

44. In the *CMRS Third Report & Order*, the Commission concluded that incumbent SMR systems in the 900 MHz MTA blocks were entitled to co-channel protection by MTA licensees,[39] as well as adjacent channel interference protection, as discussed in ¶¶44-47, *infra*.[40] We determined that mandatory relocation of incumbents was not feasible in the 900

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years. 47 C.F.R. § 24.203(a).

[37] *CMRS Third Report & Order* at ¶ 180.

[38] *See* 47 C.F.R. §§ 24.103(h), 24.203(b).

[39] *CMRS Third Report & Order* at ¶ 145.

[40] *Id.* at ¶ 161.

MHz band because no alternative 900 MHz SMR channels were available for relocation, but stated that MTA licensees could negotiate mergers, buyouts, frequency swaps, or similar arrangements with incumbent systems on a voluntary basis.[41] We will therefore require MTA licensees to afford protection to incumbent SMR systems as provided by 47 C.F.R. § 90.621(b), either by locating their stations at least 113 km (70 mi) from the facilities of any incumbent, by complying with the co-channel separation standards set forth in our "short-spacing" rule if they seek to operate stations located less than 113 km (70 mi) from an incumbent licensee's facilities,[42] or by negotiating an even shorter distance with the incumbent licensee. This will adequately protect incumbent operations without hampering the ability of MTA licensees to construct stations throughout their authorized service area.

45. Additionally, the Commission stated in the *CMRS Third Report & Order* that while incumbent 900 MHz SMR systems are entitled to full co-channel interference protection for existing facilities, they would not be allowed to expand beyond existing service areas unless they obtain the MTA license for the relevant channels.[43] The *Order*, however, did not specifically define what the Commission considered to be an incumbent licensee's existing service area. RAM and Geotek assert that the Commission should define incumbent service areas in terms of fixed mileage distances.[44] They argue that an incumbent licensee's operating area should be determined by the mileage equivalent of each originally-licensed site's 22 dBu contour, which defines the station's undesired or interfering signal level. Similarly, AMTA states that a modification application to relocate a station should not be considered an initial application if it can be demonstrated that the proposed modification will not expand the station's 22 dBu contour.[45] Motorola supports AMTA's request that the Commission classify applications that do not alter the 22 dBu contour of an existing system as modification, rather than new, applications.[46] PCIA, however, requests that the Commission define existing service areas by the DFA boundary for systems that have been constructed within the DFA boundaries, and that transmitter site locations constructed within the DFA boundaries can be moved within the DFA so long as the new transmitter locations do not expand the coverage

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[41] *Id.* at ¶ 118.

[42] 47 C.F.R. § 90.621(b)(4). The distances in the table are calculated based upon the requirement that the 22 dBu signal strength contour of a proposed station does not fall within the 40 dBu signal strength contour of an existing station.

[43] *CMRS Third Report & Order* at ¶ 118.

[44] RAM/Geotek Joint *Ex Parte* Presentation at 3.

[45] *See* AMTA Petition for Reconsideration and Request for Clarification, filed Dec. 21, 1994, at 23.

[46] *See* Motorola Comments, filed Jan. 20, 1995, at 4.

area beyond the DFA boundaries.[47]

46. To provide incumbent 900 MHz SMR licensees with additional flexibility, we are defining the existing service area of an incumbent system by its originally-licensed 40 dBu signal strength contour. We are rejecting RAM and Geotek's suggestion that we adopt a fixed mileage separation based upon the 22 dBu signal strength contour because in the 900 MHz SMR service we have consistently defined the desired signal strength contour by the 40 dBu signal strength contour.[48] We decline to adopt the suggestion of AMTA and Motorola to utilize the 22 dBu signal strength contour for incumbent protected service areas, because we believe it would be difficult to expand the 22 dBu contour without also expanding the 40 dBu contour. We also reject PCIA's request that we define existing service areas by DFA boundaries. Adoption of a DFA service area definition would be inequitable, since it does not require an incumbent licensee to have provided coverage of its service area prior to receiving protection.

47. Our objective is to allow incumbents to continue existing operations without harmful interference and to give them flexibility to modify or augment their systems so long as they do not encroach on the MTA licensee's operations. Thus, incumbent licensees will be able to add new transmitters in their existing service area, without prior notification to the Commission, *e.g.*, to fill in "dead spots" in coverage or to reconfigure their systems to increase capacity within their service area, so long as their original 40 dBu signal strength contour is not expanded. Incumbent licensees will be required to notify the Commission of any changes in technical parameters or additional stations constructed, including agreements with an MTA licensee to expand beyond their signal strength contour, through a minor modification of their license. These minor modification applications will not be subject to public notice and petition to deny requirements or mutually exclusive applications.

4. Field Strength Limit at the MTA Boundary

48. In the *CMRS Third Report & Order*, we also concluded that co-channel interference criteria for adjacent MTA licensees would be similar to those imposed on the cellular and PCS services in that they would only apply to transmitting locations near the boundaries of each licensee's MTA.[49] With respect to the co-channel interference criteria between adjacent MTA licensees, RAM and Geotek support permitting a field strength limit at any location on the border of the MTA service area of 40 dBuV/m, unless all affected parties

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[47] *See* PCIA *Ex Parte* Presentation, filed Dec. 9, 1994, at 2; PCIA Petition for Reconsideration and Clarification, filed Dec. 21, 1994, at 14-15; PCIA Reply Comments, filed Jan. 30, 1995, at 5.

[48] *See e.g.*, Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating above 800 MHz, *Report and Order*, PR Docket No. 93-60, 8 FCC Rcd 7293 (1993).

[49] *CMRS Third Report & Order* at ¶ 145.

agree to a higher level.[50] They also ask that MTA licensees be required to coordinate in good faith their frequency usage with co-channel adjacent MTA licensees, and, if applicable, other affected parties.

49. We agree that MTA licensees should not be permitted to exceed a signal level of 40 dBuV/m at their service area boundaries, unless all bordering MTA licensees agree to a higher field strength. We also adopt RAM and Geotek's proposal to require coordination of frequency usage between co-channel adjacent MTA licensees and all other affected parties. This approach provides MTA licensees a signal strength level sufficient to operate their systems up to the borders of their MTA licenses while also providing protection to adjacent operations. As an exception to this requirement, to the extent that a single entity obtains licenses for adjacent MTAs on the same channel block, it will not be required to coordinate its operations in this manner.

5. Secondary Sites

50. In discussing the treatment of 900 MHz SMR incumbent systems, the Commission determined in the *CMRS Third Report & Order* that incumbent systems are entitled to full co-channel interference protection for existing facilities, but are not allowed to expand beyond existing service areas unless they obtain the MTA license for the relevant channels.[51] We also noted that, in some instances, incumbent 900 MHz licensees had been granted authorizations to construct facilities outside of their DFAs on a secondary (*i.e.*, unprotected) basis to link their facilities in different markets. Although the Commission did not afford formal protection to these sites originally, they developed on an interference-free basis as a practical matter, due to the freeze on primary licensing outside the DFAs.[52] To prevent unnecessary disruption of existing operations, the Commission concluded that 900 MHz secondary sites licensed on or before August 9, 1994 would be afforded primary status, thus requiring the new MTA licensees to afford them full co-channel interference protection.[53]

51. On reconsideration, and in subsequent *ex parte* requests to the Commission, RAM and Geotek urge the Commission to extend protected status to all secondary sites for which applications were filed on or before August 9, 1994, even if they were not granted until after

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[50] RAM/Geotek Joint *Ex Parte* Presentation at Appendix A.

[51] *CMRS Third Report & Order* at ¶ 118.

[52] On November 4, 1986, the Commission opened a single filing window for applications inside the DFAs. *See* Public Notice of Nov. 4, 1986.

[53] *CMRS Third Report & Order* at ¶ 119.

August 9.[54] The American Mobile Telecommunications Association (AMTA) and the Personal Communications Industries Association also filed petitions for reconsideration, Motorola filed reply comments raising the same issue,[55] and both PCIA and AMTA have since submitted letters supporting the RAM/Geotek position.[56]

52. In support of their request, RAM and Geotek argue that many of these pre-August 10 applications had been pending at the Commission for several months when the *CMRS Third Report & Order* was adopted, and could have been granted on or before August 9 but for delays in Commission processing.[57] Geotek also argues that the Commission's recent decision to process the much larger backlog of pending 800 MHz SMR applications compels similar treatment of 900 MHz applications.[58] According to RAM, the equities lie with the incumbents who have built systems at 900 MHz and have taken tremendous risks to develop innovative systems and services.[59] In that same vein, AMTA points out that, during the suspension of expanded 900 MHz SMR licensing, many licensees assumed substantial business risk by applying for and constructing unprotected secondary sites to permit uninterrupted service coverage and to satisfy customer demand.[60] In the alternative, RAM and Geotek propose that the Commission's technical rules permit an incumbent to construct sites on a protected basis within the DFA areas to which they previously have been licensed.[61]

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[54] Geotek Petition for Reconsideration and Clarification, filed Dec. 21, 1994, at 3-10; RAM Petition for Reconsideration, filed Dec. 21, 1994, at 6-8; RAM *Ex parte* Presentation, filed Aug. 29, 1994 at 3; RAM *Ex parte* Presentation, filed Nov. 18, 1994, at 4; RAM *Ex parte* Presentation, filed Dec. 19, 1994 at 5-6; RAM/Geotek Joint *Ex parte* Presentation, filed Feb. 6, 1995, at 2.

[55] *See* AMTA Petition at 6-7; PCIA Petition at 13-14; PCIA/ NABER *ex parte* letter, filed Dec. 9, 1994, at 2; Motorola Comments at 2-3; PCIA Reply Comments at 5.

[56] *See* AMTA *Ex parte* letter, filed Dec. 8, 1994; PCIA/NABER *ex parte* letter.

[57] *See* RAM *Ex parte* Presentation, filed Aug. 29, 1994 at 1-2; RAM *Ex parte* Presentation, filed Oct. 26, 1994, at 1; RAM *Ex parte* Presentation, filed Nov. 18, 1994, at 4; RAM *Ex parte* Presentation, filed Dec. 19, 1994, at 6; RAM/Geotek Joint *Ex parte* Presentation at 2.

[58] Geotek Petition at 6.

[59] RAM *Ex parte* Presentation, filed Aug. 29, 1994, at 5; RAM *Ex parte* Presentation, filed Dec. 19, 1994, at 6.

[60] AMTA Petition at 5-7; AMTA *Ex parte* Letter, filed Dec. 8, 1994, at 2.

[61] RAM/Geotek Joint *Ex Parte* Presentation at 2.

53. While we do not agree that our 800 MHz decision compels granting of primary site protection. we are persuaded by petitioners' other arguments and grant their requests. First, granting primary site protection for additional sites will promote uninterrupted service to the public. Second, affected incumbents would acquire protection for only a *de minimis* amount of new spectrum.[62] Finally, our delays in processing secondary site applications in the 900 MHz SMR service appear to have produced an inequitable result for applicants who otherwise would have been entitled to protection under the *CMRS Third Report & Order*. Therefore, we require all MTA licensees to provide complete co-channel protection to all sites for which applications were filed on or before August 9, 1994. Secondary sites based on applications filed after August 9 will not be afforded such protection, however.[63] Information with respect to which secondary sites will be entitled to primary site protection will be available in the bidder's package for this service.

6. Loading Requirements

54. In the *CMRS Third Report & Order*, the Commission determined that loading requirements, which were adopted in the SMR services to protect against spectrum warehousing, are not necessary for MTA-based licensing of 900 MHz SMR, provided that licensees are subject to strict construction and coverage requirements.[64] However, the Commission retained the loading/automatic cancellation requirement for 900 MHz SMR incumbent licensees.[65] We distinguished 900 MHz service from 800 MHz service in this respect, noting that while 800 MHz SMR has matured to a point where continued application of loading requirements no longer served a public interest purpose, the 900 MHz SMR market is less mature both because initial licensing occurred more recently than at 800 MHz and because 900 MHz systems have hitherto operated in limited service areas.[66] We also noted that our then-existing 900 MHz SMR rules did not require licensees to achieve significant

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[62] There are a relatively small number of affected applications (approximately 300) that would increase the footprint of affected licensees.

[63] *See* Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Order on Reconsideration*,GN Docket No. 93-252, FCC 94-331, rel. Dec. 22, 1994, 10 FCC Rcd __ (1995) at ¶ 5, 60 Fed. Reg. 3773 (Jan. 19, 1995).

[64] *CMRS Third Report & Order* at ¶¶ 190-192.

[65] 47 C.F.R. § 90.631(i). Section 90.631(b) requires that each applicant for a trunked system certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant (with the exception of the two-year renewal provided in subsection (i)); otherwise authorizations cancel automatically.

[66] *CMRS Third Report & Order* at ¶ 194.

coverage of their designated service areas in order to retain their authorizations.[67]

55. On reconsideration, Geotek, RAM, AMTA, Motorola, and PCIA urge the Commission to eliminate loading requirements for all 900 MHz licensees, including incumbents.[68] Geotek argues that to do so would achieve regulatory parity among competing services, consistent with the goals of the Budget Act.[69] RAM argues that imposing loading requirements unfairly penalizes incumbents because of the Commission's unwillingness to give them the same ability to expand that has consistently been given to other systems.[70] AMTA argues that the 900 MHz service is, in fact, more mature than the 800 MHz service because the 800 MHz loading requirements only applied to systems that were licensed for new or additional channels after September 1989 and prior to June 1, 1993, while many 900 MHz systems were licensed and placed in operation in 1987.[71] AMTA also asserts that because the Commission's rules precluded 900 MHz SMR operators from providing significant coverage outside the DFAs, the Commission cannot rely on the licensees' failure to provide wider coverage as justification for retaining the loading requirements.[72] PCIA and Motorola argue that legitimate licensees in the band who have invested seven years of capital and labor in the business should not be forced to relinquish channels because they were not fully permitted to provide the service for which the allocation was designed.[73] These petitioners also contend that the requirement places 900 MHz licensees on an uneven playing field with other CMRS licensees.[74]

56. Assuming that we elect to retain loading requirements for incumbents, RAM has requested a temporary stay of these requirements as they apply to RAM pending the outcome of the 900 MHz auction.[75] RAM states that the nature of its nationwide data system makes it difficult to apply loading criteria to particular stations or channels, and that application of loading criteria between now and the 900 MHz auction could therefore cause it to lose some

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[67] *Id.*

[68] Geotek Petition at 12; RAM Petition at 8-10; AMTA Petition at 10-14; PCIA Petition at 6-7; Motorola Comments at 3; PCIA Reply Comments at 3.

[69] Geotek Petition at 12.

[70] RAM Petition at 10.

[71] AMTA Petition at 12.

[72] *Id.* at 13.

[73] PCIA Petition at 7; Motorola Comments at 3.

[74] PCIA Petition at 6; PCIA Reply Comments at 3; Motorola Comments at 3.

[75] *See* RAM Request for Stay, filed Nov. 16, 1994.

of its existing authorizations. RAM also states that it intends to participate fully in the 900 MHz auction to obtain MTA licenses for the channel blocks that it currently uses, which would eliminate loading requirements for RAM where it is the successful bidder. RAM therefore requests that we stay the loading requirements as they apply to its existing authorizations until 30 days after the MTA license for each 10-channel block issued. If RAM is the successful bidder, the loading issue would be mooted; if it is not the successful bidder, it would be required to comply with loading requirements for its existing authorizations in the block. In support of its request, RAM contends its system has unique characteristics that make it unnecessary to mechanically apply the current loading requirements. RAM points out that it has already constructed a wide area network of more than 900 sites that covers more than 64% of the nation's population, and 25% of the population in all but two of the continental United States MTAs and Hawaii. This amount of coverage, RAM notes, compares favorably with coverage requirements for broadband PCS licensees.[76]

57. While we recognize the concerns of the petitioners, we affirm our decision in the *CMRS Third Report & Order* that the loading requirements for incumbent 900 MHz SMR licensees should be retained. Our decision is based on the unique history and nature of the 900 MHz service as it has developed to date. As we pointed out in the *CMRS Third Report & Order*, the 900 MHz service is not a mature service, both because it was licensed more recently than 800 MHz and because Phase I licensing has been confined to limited service areas. Based on these factors, we have already granted special relief to 900 MHz licensees by providing them with an additional two years to load their systems on top of the five years originally granted.[77] Having granted this relief, we believe that eliminating loading requirements at this point for incumbent licensees who have failed to fully load their systems would not be in the public interest. Even if it is true, as petitioners contend, that incumbents have been unable to load their systems because they are limited to operating in DFAs, they now have the ability to overcome this obstacle by obtaining an MTA license, which exempts them from all previously applicable loading requirements. We see no reason, however, why an incumbent who does not obtain an MTA license should be entitled to retain spectrum that it has been unable to load for seven years. Moreover, these requirements will prevent the warehousing of spectrum. Once the Commission takes back channels from an incumbent licensee who has not met loading requirements, the spectrum covered by the incumbent's authorization will automatically revert to the MTA licensee who has obtained the contingent rights to that spectrum.[78]

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[76] Under our broadband PCS rules, 10 MHz PCS BTA licensees have a 25% coverage requirement. 47 C.F.R. § 24.203(b). Also, 30 MHz MTA licensees must cover one-third of their population within five years. *Id.* § 24.203(a).

[77] Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, PR Docket No. 92-17, 7 FCC Rcd 4914 (1992).

[78] *See, e.g., 800 MHz Further Notice* at ¶ 31.

58. While we are retaining the loading requirements for 900 MHz incumbents generally, we will grant RAM's request for temporary relief from loading requirements until the conclusion of the auction. Because RAM's request would allow it to retain certain authorizations without making a loading showing at this point, we find RAM's request more analogous to a waiver request than a request for stay. Before a request for waiver will be granted, the petitioner must clearly demonstrate that the general rule is not in the public interest when applied to its particular case, and that the grant of the waiver will not undermine the public policy served by the rule.[79] We find that RAM has presented unique circumstances that warrant granting of a waiver.

59. First, RAM is one of the few 900 MHz incumbents that actually has constructed a wide-area network. Because of the unusual size and complexity of the network, we have previously granted RAM an extension of the construction period for its system and have allowed it four years to load each system to the required level.[80] RAM has used this authority in a timely manner to construct a substantial wide area network of more than 900 sites that covers more than 64% of the nation's population, and 25% of the population in all but two of the continental United States MTAs and Hawaii. Second, we agree with RAM that the nature of its nationwide data system makes it difficult to apply loading criteria to particular stations or channels, and that the application of such criteria could be disruptive to its existing network. Finally, we note that RAM intends to participate fully in the auction, and that it is willing to submit to loading requirements to the extent that it does not obtain MTA licenses for the areas in which it operates. Based on these factors, we will waive the application of the loading rules to RAM's system until 30 days after the completion of the auction. At that point, RAM will be required to demonstrate loading for any authorization (1) for which a showing would otherwise have been required prior to the auction, and (2) that is not within the area of an MTA license obtained by RAM.

7. Emission Masks

60. The Commission generally subjects mobile radio services to emission mask rules that restrict transmitter emissions on the spectrum adjacent to the licensee's adjacent channel. In the *CMRS Third Report & Order*, we affirmed that our out-of-band emission rules should apply only where emissions have the potential to affect other licensees' operations.[81]

61. Thus, we will only apply emission mask rules to "outer" MTA channels in each block (*i.e.*, the channels on the outer edges of an MTA licensee's channel block) and to "interior" MTA channels (*i.e.*, the channels inside of the MTA licensee's channel block

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[79] *AT&T Co.*, 94 FCC 2d 545, 548 (1983); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[80] *American Mobile Data Communications, Inc.*, 4 FCC Rcd 3802 (1989).

[81] *CMRS Third Report & Order* at ¶ 161.

assignment that are adjacent to other licensees) where there are incumbent SMR licensees who will be affected by the MTA licensee's operations. We believe that these channels alone have the potential to affect operations outside of the MTA licensee's authorized bandwidth. Moreover, this approach is consistent with our action in the broadband PCS context. Specifically, for wide-area licensees in the 900 MHz SMR band on any frequency outside the MTA licensee's frequency block, the peak power of any emission shall be attenuated below the transmitter power (P) by at least 43 plus 10 $\log_{10}(P)$ decibels or 80 decibels, whichever is the lesser attenuation. We conclude that this emission mask will adequately protect other MTA licensees. We note, however, that MTA licensees will also be required to provide adjacent channel protection to "interior" channels used by incumbent licensees, as we decided in the *CMRS Third Report & Order*.[82] As an exception to this requirement, if a single entity aggregates adjacent channel blocks, it will not be required to mask its emissions at the band edge of each ten channel block.

8. Mexican/Canadian Border Areas

62. In the Mexican and Canadian border areas, 900 MHz SMR channel availability is restricted by treaty and limitations on ERP and antenna height have been placed on additional channels.[83] As a result, some 900 MHz channels may not be available to MTA licensees operating in border areas or may suffer from significant restrictions on ERP or antenna height, making them less attractive for MTA licensees.

63. We will, however, use the same allocation of MTA channel blocks in border areas as in non-border areas. Thus, use of channels in MTAs that encompass border areas will be subject to the relevant rules regarding international assignments and coordination of such channels. This permits applicants to assess the impact of the border requirements in their valuation of those blocks for competitive bidding purposes.

9. Discontinuance of Operation

64. In the *Phase II First Report & Order*, the Commission revised Section 90.631(f), which provides that SMR licenses cancel automatically if a licensee discontinues station operations for more than 60 consecutive days, unless the Commission authorizes additional time for station operations to remain discontinued. Under the rule, if the Commission does not authorize additional time, the subject license cancels automatically unless the station resumes operations within five days after the licensee receives the Commission's letter declining to authorize additional time.[84] Shortly thereafter, the Commission stayed the

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[82] *Id.*

[83] *See* 47 C.F.R. §§ 90.619(b)(2), (d).

[84] 47 C.F.R. § 90.631(f).

enforcement of that rule,[85] in response to a request by AMTA,[86] pending the Commission's disposition of AMTA's petition for reconsideration.[87] In this Order, we rule on AMTA's petition for reconsideration, which requests that the Commission extend that five-day time period to 60 days, based on the unavoidable nature of a temporary discontinuance of operation, and the onerous effect of a five-day cancellation in some instances. As examples, AMTA cites the discovery of the inadequacy of a site, due to either technical problems or business considerations. AMTA expresses concern that if the Commission does not share the licensee's view that its showing is sufficient to be out of operation for more than 60 days, then five days is inadequate to rectify the problem and reinstitute service.[88]

65. The Omnibus Budget Reconciliation Act of 1993 requires the Commission to modify its rules, to the extent "necessary and practical," to ensure that substantially similar services are subject to "comparable" technical requirements.[89] Moreover, we concluded in the *CMRS Third Report & Order* that the 800 and 900 MHz SMR services compete or have the potential to compete with existing wide-area CMRS service providers.[90] We believe that we should modify our existing permanent discontinuance rule in accordance with the requirements for cellular and PCS to the extent practical. Therefore, we are modifying Section 90.631(f) to include provisions comparable to those contained in Section 22.317 for cellular operations. This will permit licensees to discontinue operations for 90 continuous days and removes any provisions for licensees to request an additional extension of this period. AMTA's concern about extending from five days to sixty days the period for reinstituting service, therefore, is no longer valid. Thus, we find AMTA's petition for reconsideration moot, and we will enforce Section 90.631(f), as modified herein.

B. MISCELLANEOUS MATTERS

1. Spectrum Cap and Attribution

66. In the *CMRS Third Report & Order*, we adopted a 45 MHz aggregate spectrum cap on CMRS uses within the three radio services, broadband PCS, cellular, and SMR.

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[85] Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool. *Order*, 8 FCC Rcd 3974 (1993).

[86] AMTA Request for Stay, filed April 2, 1993.

[87] AMTA Petition for Reconsideration, filed April 2, 1993.

[88] AMTA Petition at 7-8.

[89] Budget Act, § 6002(d)(3), 107 Stat. 312 (1993).

[90] *See e.g., CMRS Third Report & Order* at ¶ 94.

Accordingly, an entity may hold up to 45 MHz of spectrum in the three services in any geographic area.[91] For example, an entity may hold 5 MHz of 900 MHz SMR spectrum, a 30 MHz PCS, and a 10 MHz PCS license in the same area; or an entity may hold 10 MHz of SMR spectrum, a cellular license accounting for 25 MHz and a 10 MHz PCS license.

67. We also adopted a 20 percent cross-ownership attribution rule for purposes of the SMR, broadband PCS, and cellular spectrum aggregation limit.[92] By this rule, an entity with 20 percent or greater ownership of a 900 MHz SMR license who has 40 MHz of broadband PCS spectrum in a geographic market would reach the spectrum cap with 5 MHz of SMR spectrum in an MTA within that geographic market. Although we stated that we would use the multiplier adopted in the *Broadband PCS Further Order on Reconsideration*,[93] in lieu of a bright-line test, to determine attribution when cellular, broadband PCS and SMR licensees are held indirectly through intervening corporate entities,[94] we have since refined and clarified our PCS rules with respect to the use of the multiplier.[95]

68. We also adopted a 10 percent population overlap threshold, in which a provider's spectrum counts toward the cellular-PCS-SMR spectrum cap if the carrier is licensed to serve 10 percent or more of the population of the MTA.[96] As indicated, all 900 MHz SMR channels count toward the limit.[97] Therefore, 900 MHz SMR operators who intend to aggregate across channel blocks must comply with the spectrum cap.

2. Grandfathering

a. Regulatory Classification

69. In the *CMRS Second Report & Order*, the Commission stated that SMR licensees

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[91] *Id.* at ¶ 263.

[92] *Id.* at ¶ 276.

[93] Amendment of the Commission's Rules to Establish New Personal Communications Services, *Further Order on Reconsideration*, GEN Docket No. 90-314, 9 FCC Rcd 4441 (1994) (*Broadband PCS Further Order on Reconsideration*).

[94] *CMRS Third Report & Order* at ¶ 276.

[95] Amendment of the Commission's Rules to Establish New Personal Communications Services in the 2 GHz Band, *Memorandum Opinion and Order*, GEN Docket No. 90-314, FCC 95-92 (rel. March 3, 1995).

[96] *CMRS Third Report & Order* at ¶ 279.

[97] *Id.* at ¶ 280 (explaining calculation of attributable SMR spectrum).

are classified as CMRS if they offer interconnected service, and are otherwise classified as PMRS.[98] All 900 MHz MTA licensees presumptively will be classified as CMRS providers.[99] Consistent with the *CMRS Third Report & Order*,[100] however, the presumption will not be applied before August 10, 1996 to an MTA licensee who was an incumbent in the 900 MHz service before August 10, 1993. As such, these licensees are not subject to CMRS regulation for three years from the enactment date under the Budget Act's grandfathering provision.[101]

b. Foreign Ownership Waivers

70. Section 332(c)(6) of the Communications Act permits the Commission to waive the application of Section 310(b) to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier, as a result of the Budget Act, on the condition that the extent of foreign ownership not increase above the pre-May 24, 1993 level, and that no subsequent transfer of ownership is made to anyone in violation of Section 310(b).[102] As a result of our decision to treat incumbent licensees as new applicants for purposes of competing for an MTA license, the question arises as to whether a waiver filed by an incumbent licensee will cover the MTA license, in the event that the incumbent wins the MTA license.[103]

71. We will grandfather any timely-filed waiver petitions[104] with respect to the MTA license filed by an incumbent within the MTA. Although the MTA license is considered a "new" license, the existing facilities of the provider will be entirely subsumed in the new license. Thus, we believe it is unnecessary to require an additional filing by an incumbent who wins the MTA license.

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[98] *CMRS Second Report & Order* at ¶¶ 82-109.

[99] *See id.* at ¶¶ 88-93; *CMRS Third Report & Order* at ¶ 30.

[100] *CMRS Third Report & Order* at ¶ 9.

[101] Budget Act, § 6002(c)(2)(B)(1993); 47 U.S.C. § 332(c)(2)(B).

[102] Budget Act, § 6002(b)(6)(1993); 47 U.S.C. § 332(b)(6).

[103] For example, on February 8, 1995, Geotek filed a waiver of Sections 310(b)(3) and 310(b)(4) of the Act to permit it, its subsidiaries, and affiliates to retain certain foreign officers and directors, which remains pending.

[104] Under 47 U.S.C. § 332(b)(6), waivers had to be filed within six months after the date of enactment of the Budget Act, *i.e.*, February 10, 1994. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *First Report and Order*,GN Docket No. 93-252, 9 FCC Rcd 1056 (1994) at ¶ 15.

V. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING: AUCTION RULES

A. Competitive Bidding

72. In the *CMRS Third Report & Order*, the Commission determined that it would use competitive bidding to select from among mutually exclusive applicants in the 900 MHz SMR service.[105] Accordingly, under our auction authority, if mutually exclusive applications for an MTA 10-channel block are accepted for filing, we will award that license through competitive bidding. We request comment on specific bidding procedures, as set forth below.

1. Competitive Bidding Design for 900 MHz SMR

73. In the *Auctions Second Report & Order*, we established the criteria to be used in selecting from among auction methodologies to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly would foster Congress's policy objectives. We noted there that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. We also stated that: (1) licenses with strong value interdependencies should be auctioned simultaneously and (2) multiple round auctions generally will yield more efficient allocations of licenses and higher revenues by providing bidders with information regarding other bidders' valuations of licenses, especially where there is substantial uncertainty as to value.[106] Thus, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.[107]

74. Based on the factors identified in the *Auctions Second Report & Order*, we tentatively conclude that simultaneous multiple round auctions are appropriate for the 900 MHz SMR service.[108] As in the case of PCS,[109] the 900 MHz SMR licenses are

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[105] *Id.* at ¶ 337.

[106] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Auctions Second Report & Order*) at ¶ 69.

[107] *Id.* at ¶¶ 109-111.

[108] Both RAM and Geotek support this design. RAM *Ex Parte* Presentation, filed Dec. 19, 1994, at 11; *Cf.* RAM/Geotek Joint *Ex Parte* Presentation at 4.

interdependent, and licensees likely will aggregate and substitute across spectrum blocks and geographic regions. Therefore, simultaneous multiple round bidding is likely to generate the most information about license values during the course of the auction and facilitate efficient aggregation of licenses across spectrum bands. We seek comments on this tentative conclusion.

75. We note, however, that the presence of incumbents on certain channels could affect the relative desirability and value of otherwise identical MTA licenses in ways we do not anticipate. In the event that the short-form filings indicate that particular 900 MHz licenses are not substantially interdependent, we propose to delegate authority to the Wireless Telecommunications Bureau to revisit the issue of whether another auction design would be more appropriate. Under this proposal, the bidder's package would include information about available spectrum on each channel block within each MTA.

2. License Grouping

76. The Commission determined in the *Auctions Second Report and Order* that in a multiple round auction, highly interdependent licenses should be grouped together and put up for bid at the same time because such grouping provides bidders with the most information about the prices of complementary and substitutable licenses during the course of an auction.[110] We also determined that the greater the degree of interdependence among the licenses, the greater the benefit of auctioning a group of licenses together in a simultaneous multiple round auction.[111]

77. RAM and Geotek, the two largest incumbents in the 900 MHz SMR service, question whether it is practical to hold a simultaneous auction of all MTA licenses given the aggregate number of licenses to be auctioned. They suggest that we auction the licenses on an MTA-by-MTA basis, starting with the most densely populated MTA and ending with the least densely populated MTA, or that we group the MTA licenses by region for auction purposes.[112]

78. We tentatively conclude that all 51 MTAs in the 900 MHz SMR band should be

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[109] We adopted simultaneous multiple round auctions as the auction methodology for both broadband and narrowband PCS licenses. *See Auctions Fifth Report & Order* at ¶¶ 27-32 (broadband PCS); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Third Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2941 (1994)(*Auctions Third Report & Order*) at ¶¶ 17-21 (narrowband PCS).

[110] *Auctions Second Report & Order* at ¶¶ 106-107.

[111] *Id.* at ¶¶ 89-94; *Auctions Fifth Report & Order* at ¶ 36.

[112] RAM/Geotek Supplementary Joint *Ex Parte* Presentation, filed Feb. 10, 1995, at 1.

auctioned simultaneously, but seek comment on the proposals discussed above. Although grouping the licenses together may be somewhat more costly from an administrative viewpoint than breaking the licenses into groups, we believe that the added cost will be outweighed by the informational and bidding flexibility advantages afforded by a single auction.[113] The 900 MHz service may not present the same obstacles in this regard as the broadband PCS service, in which we determined that despite the high degree of interdependence among all broadband PCS licenses, a single simultaneous auction would be too costly and complex.[114] The 1,020 licenses to be auctioned in the 900 MHz SMR service are less than half the number of broadband PCS licenses to be auctioned in Blocks A through F, and unlike broadband PCS, all licenses will be for the same amount of spectrum and will use a single service area definition. Therefore, we tentatively conclude to hold a single auction, while reserving the discretion to inform applicants by Public Notice if we determine to hold more than one auction, on the basis that a single auction proves administratively difficult. We seek comment on this issue.

B. Bidding Issues

1. Bid Increments

79. As we have done in previous multiple round auctions, we propose to establish minimum bid increments for bidding in each round of the auction.[115] The bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as valid in the current bidding round. The application of a minimum bid increment helps to ensure that the auction closes within a reasonable period of time. Establishing an appropriate minimum bid increment is important in a simultaneous auction with a simultaneous closing rule, because all markets remain open until there is no bidding on any license and a delay in closing one market will delay the closing of all markets.

80. Consistent with our PCS auction procedures, we propose to start the 900 MHz auction with relatively large bid increments, and adjust the increments as bidding activity indicates. The minimum bid increment in Stage I of the auction generally would be five percent of the high bid in the previous round or $.02 per MHz-pop, whichever is greater. In Stage II, we propose to reduce the minimum bid increment to the greater of five percent or $.01 per MHz-pop, and in Stage III, the bid increment would remain at the greater of five percent or $.01 per MHz-pop. We propose to retain the discretion to vary the minimum bid increments for individual license or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid

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[113] The Commission may conclude instead that running a single auction, rather than multiple auctions is actually administratively *less* costly.

[114] *Auctions Fifth Report & Order* at ¶ 36.

[115] *See, e.g., Auctions Third Report & Order* at ¶¶ 30-32.

amounts. We propose to retain the discretion to keep an auction open if there is a round in which no bids or proactive waivers are submitted. (*See* discussion of stopping rules at ¶ ¶ 81-85, *infra*)

2. Stopping Rules

81. In multiple round auctions, a stopping rule must be established for determining when the auction is over.[116] In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under a license-by-license approach, bidding closes on each license after a certain number of rounds pass in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding remains open on all licenses until there is no new acceptable bid for any license. This approach provides bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions unless an activity rule is imposed. Under a hybrid approach, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use the license-by-license approach.

82. For 900 MHz SMR, we propose to adopt a simultaneous stopping rule. MTA licenses are expected to have relatively high values because of the substantial amount of clear spectrum that remains available and the high valuation of SMR spectrum in secondary market transactions. The substitutability between licenses within the same MTA, and the ability to pursue back-up strategies also support the proposal to use a simultaneous stopping rule. Additionally, using MTAs rather than BTAs or other more numerous service areas should reduce the complexity of implementing a simultaneous stopping rule. Because we propose to impose an activity rule (as discussed at ¶¶ 87-93, *infra*), we believe that allowing simultaneous closing for all licenses should afford bidders flexibility to pursue back-up strategies. We seek comment on this issue.

83. In the event we adopt a simultaneous stopping rule, we will retain the discretion to announce at any time during the auction that the auction will end after a specified number of additional rounds. If we adopt this proposal, bids would only be accepted on licenses where the high bid has increased in the last three rounds.[117] This proposal would deter bidders from continuing to bid on a few low value licenses solely to delay the closing of the auction. It would also enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed likely benefits of continuing to allow bidding. If this mechanism is used, the number of remaining rounds and other final bidding procedures would be announced by public notice. We also propose to retain the

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[116] *Id.* at ¶ 128.

[117] *Auctions Fifth Report & Order* at ¶ 49.

discretion to conduct market-by-market closings, if circumstances so warrant. We seek comment on this issue.

84. The disadvantages of declaring an imminent end to an auction, however, are that the procedure may result in less efficient allocation of licenses than if the auction remained open as long as new bids were received.[118] Therefore, we propose to declare the imminent end of the auction only in the case of extremely dilatory bidding, as we favor other methods to hasten the end of an auction -- shortening the bidding rounds, raising the minimum bid increments, and proceeding to a later auction stage.[119] We seek comment on this issue.

85. In the *Fourth Memorandum Opinion & Order*, we determined that we will keep an auction open in a round in which no new acceptable bids are submitted if we receive a "proactive" waiver of the activity rules.[120] (See discussion of activity rule waivers at ¶¶ 87-93, *infra*). With respect to the broadband PCS auctions, we later modified the rule by retaining the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round.[121] We propose to employ the same procedure with respect to the 900 MHz SMR auctions. This would facilitate the rapid completion of the auction by permitting the Commission to use larger bid increments, thereby speeding the auction pace without risking a premature auction close.[122] We seek comment on these issues.

3. Duration of Bidding Rounds

86. We propose to reserve the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run more than one round per day) in order to move the auction toward closure more quickly. Under this proposal, we would announce any changes to the duration of and intervals between bidding rounds either by public notice prior to the auction or by announcement during the auction. We seek comment on this issue.

4. Activity Rules

87. As discussed above, in order to ensure that simultaneous auctions with

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[118] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858 (1994) (*Auctions Fourth Memorandum Opinion & Order*) at ¶ 20.

[119] *Id.*

[120] *Id.* at ¶ 15.

[121] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684 (1994) at ¶ 3.

[122] *Id.* at ¶ 5.

simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. In the *Auctions Second Report & Order*, we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used.[123] The Milgrom-Wilson approach encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and make an upfront payment equal to $0.02 per MHz-pop.[124] (*See* discussion of upfront payments at ¶ 107, *infra*) In each round, bidders are limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder from the previous round, as well as licenses on which a new valid bid is placed, count toward this MHz-pop limit. Under this approach, bidders have the flexibility to shift their bids among any license for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid.

88. We tentatively conclude that the Milgrom-Wilson activity rule should be used in conjunction with the proposed simultaneous stopping rule to award 900 MHz SMR licenses. This proposal would best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. Under the Milgrom-Wilson procedure, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, increases during the course of the auction. Absent waivers (discussed *infra*), a bidder's eligibility (in terms of MHz-pops) in the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by $.02 per MHz-pop. We seek comment on this issue.

89. During Stage I, we tentatively conclude that a bidder must be active on licenses encompassing one-half of the MHz-pops for which it is eligible. In Stage II and Stage III, we tentatively conclude that the bidder must be active on 75% and 95%, respectively, of the MHz-pops for which it is eligible. Under this proposal, the "penalty" for falling below the minimum activity level at any stage would be a reduction in maximum eligibility to bid in future rounds. For example, in Stage I, the penalty for falling below that activity level would be the loss of 2 MHz-pops in eligibility for each MHz-pop that the bidder falls below the minimum required activity level. As in prior auctions, we propose to determine the transition from one stage to the next in the 900 MHz SMR auction by the aggregate level of bidding activity, subject to our discretion. The transition rule may also be defined in terms of

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[123] *Auctions Second Report & Order* at ¶¶ 144-145.

[124] The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

the "auction activity level" -- the sum of the MHz-pops of those licenses whose high bid increased in the current round, as a percentage of the total MHz-pops of all licenses in that auction. Under our proposal, the auction would start in Stage I and move to Stage II when, in each of three consecutive rounds of bidding, the high bid has increased on 10 percent or less of the spectrum (measured in terms of MHz-pops) being auctioned. Similarly, the auction would move to Stage III when the high bid has increased on five percent or less of the spectrum being auctioned in each of three consecutive rounds of bidding in Stage II. We seek comment on these proposals.

90. Moreover, if we adopt this proposal, we reserve the discretion to increase or decrease these activity levels, as well as to vary the timing of stages and activity levels for each stage through public notices issued after applications are filed and before the auction begins, as circumstances warrant. In addition, we would retain the discretion during the auction to change stages.

91. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, we propose to implement a procedure for waiver of the activity rule. In the *Fourth Memorandum Opinion & Order*, we stated that the Commission retained the discretion to modify the method and timing of submitting waivers and to allow for two types of waivers -- "proactive" and "automatic."[125] As explained therein, proactive waivers invoked in a round in which there are no new valid bids will keep an auction open, while an automatic waiver submitted in a round in which no other bidding activity occurs will not keep an auction open.[126] Proactive waivers are submitted by the bidder while automatic waivers would be submitted automatically for a bidder whenever a bidder's eligibility would be reduced because of insufficient bidding activity and a waiver is available unless the bidder specifically chooses not to have the automatic waiver apply.[127] Automatic activity rule waivers would be automatically applied by the bidding system in any round where a bidder's activity is below the requested activity level as long as the bidder has waivers remaining.

92. Under this proposal, we would announce by Public Notice how many waivers bidders will receive. A waiver would permit a bidder to maintain its eligibility at the same level as in the round for which the waiver is applied. A waiver, however, could not be used to correct an error in the amount bid. This would ensure that bidders are not arbitrarily penalized by having their eligibility reduced due to an accidental act or circumstances not under the bidder's control. We seek comment on these proposals.

93. While we are proposing the adoption of the Milgrom-Wilson activity rule by this

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[125] *Auctions Fourth Memorandum Opinion & Order* at ¶ 15.

[126] *Id.*

[127] *Id.*

Further Notice, we also retain the discretion to use an alternative activity rule for 900 MHz if we determine that the Milgrom-Wilson rule is too complicated or costly to administer.[128] Any such change would be announced by public notice before commencement of the auction.

5. Rules Prohibiting Collusion

94. In the *Auctions Second Report & Order*, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding.[129] We observed that such a rule would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders.[130] We believe that this rule is appropriate for the 900 MHz SMR service. Therefore, we tentatively conclude that Section 1.2105(c) will apply to 900 MHz SMR auctions. The rule prohibits bidders from communicating with one another after short-form applications have been filed regarding the substance of their bids or bidding strategies, and also prohibits bidders from entering into consortium arrangements or joint bidding agreements after the deadline for short-form applications has passed.[131] In the *Second Memorandum Opinion & Order*, we modified the rule so that bidders who have not filed Form 175 applications for licenses in any of the same geographic markets may enter into such discussions, consortia, or arrangements, or add equity partners, during the course of an auction, because of the low risk of anticompetitive conduct among bidders that have not applied for licenses in any of the same geographic areas.[132] Furthermore, in the *Fourth Memorandum Opinion & Order*, we noted that communications among bidders concerning matters unrelated to the license auctions would be permitted.[133] We seek comment on this proposal.

95. In addition, as discussed at ¶ 103, *infra*, bidders would be required by Section 1.2105(a)(2) to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders would be required to

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[128] *See id.* at ¶ 144.

[129] *See* 47 C.F.R. § 1.2105(c).

[130] *See Auctions Second Report & Order* at ¶ 221.

[131] 47 C.F.R. § 1.2105(c)(1).

[132] 47 C.F.R. § 1.2105(c)(3).

[133] *Auctions Fourth Memorandum Opinion & Order* at ¶ 59. *But see Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division*, rel. Dec. 1, 1994 (establishing that discussions that indirectly provide information that affects bidding strategy are also precluded by anti-collusion rules).

certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. We seek comment on this proposal.

96. We propose that winning bidders in 900 MHz SMR auctions be subject to Section 1.2107 of the Commission's Rules, which, *inter alia*, requires each winning bidder to attach as an exhibit to the Form 600 long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortium, joint venture, partnership, or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. Under this rule, all such arrangements must have been entered into prior to the filing of short-form applications. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions. We seek comment on this proposal.

C. Procedural and Payment Issues

1. Pre-Auction Application Procedures

97. In the *Auctions Second Report & Order*, the Commission established general competitive bidding rules and procedures which we noted may be modified on a service-specific basis.[134] As discussed below, we propose to follow generally the processing and procedural rules established in the *Auctions Second Report & Order*, with certain modifications designed to address the particular characteristics of the 900 MHz SMR service. These proposed rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public. By ensuring that bidders and license winners are serious, qualified applicants, these proposed rules will minimize the need to re-auction licenses and prevent delays in the provision of 900 MHz SMR service to the public.

98. As MTA licensees will gain use of a large geographic area and the freedom to locate base stations anywhere within that larger geographic region, they differ from the existing 900 MHz licensees that are essentially confined to the smaller DFA region. Accordingly, we propose to treat all MTA applicants as initial applicants for public notice, application processing, and auction purposes, regardless of whether they are already incumbent operators.

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[134] *See* 47 C.F.R. Part 1, Subpart Q.

99. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing."[135] Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to Section 309(a) and Section 308(b) and 310" of the Communications Act.[136] As the legislative history of Section 309(j) makes clear, the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules, and we propose to dismiss applications not meeting those requirements prior to the competitive bidding.[137]

100. In the *Auctions Second Report & Order*, we determined that we should require only a short-form application prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application after the auction. As we determined that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest, we incorporated these requirements into the rules adopted in the *Auctions Second Report & Order*.[138] Accordingly, we propose to extend the application of these rules to the competitive bidding process for 900 MHz SMR.

101. Under this proposal, before the 900 MHz SMR auction, the Wireless Telecommunications Bureau would release an initial Public Notice announcing the auction. The initial Public Notice would specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice would specify the method of competitive bidding to be used, applicable bid submission procedures, stopping rules, activity rules, and the deadline by which short-form applications must be filed and the amounts and deadlines for submitting the upfront payment.[139] We would not accept applications filed before or after the dates specified in the Public Notice. Applications submitted before the release of the Public Notice would be returned as premature. Likewise, applications submitted *after* the deadline specified by Public Notice would be dismissed, with prejudice, as untimely. We seek comment on these proposals.

102. Soon after the release of the initial Public Notice, an auction information package will be made available to prospective bidders. The bidders' package will contain information on the incumbents occupying blocks on which bidding will be available.

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[135] 47 U.S.C. § 309(j)(5).

[136] *Id.*

[137] *See* H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993) (House Report).

[138] *See* 47 C.F.R. §§ 1.2104, 1.2107.

[139] *See Auctions Second Report & Order* at ¶ 164.

Incumbents will be expected to update information on file with the Commission, such as current address and phone number, so that such information will be of use to prospective bidders.

103. Under this proposal, all bidders would be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), by the date specified in the initial Public Notice. Applicants would be encouraged to file Form 175 electronically. Detailed instructions regarding electronic filing would be contained in the Bidder Package. Those applicants filing manually would be required to submit one paper original and one microfiche original of their application, as well as two microfiche copies. The short-form applications would require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules.[140] Specifically, each applicant would be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust, or other), the markets and frequency blocks for which it is applying, and assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf.

104. As we indicated in the *Auctions Second Report & Order*, if we receive only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, we propose to issue a Public Notice cancelling the auction for this license and establishing a date for the filing of a long-form application, the acceptance of which would trigger the procedures permitting petitions to deny (as discussed at ¶ 116, *infra*).[141] If no petitions to deny are filed, the application would be grantable after 30 days. We seek comment on the proposals discussed above.

2. Amendments and Modifications

105. To encourage maximum bidder participation, we propose to provide applicants with an opportunity to correct minor defects in their short-form applications prior to the auction. On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications (*e.g.*, typographical errors, incorrect license designations, etc.) also would be permitted to file corrected applications. Recently, the Commission waived the *ex parte* rules as they applied to the submission of amended short-form applications for the A and B blocks of the broadband PCS auctions, to maximize applicants' opportunities to seek Commission staff advice on making such amendments. We

[140] 47 C.F.R. § 1.2105(a)(2).

[141] *See Auctions Second Report & Order* at ¶ 165.

propose to apply the same principles to the 900 MHz SMR auctions.[142] Under this proposal, applicants would not be permitted to make any major modifications to their applications, including changes in markets and changes in control of the applicant, or additions of other bidders into the bidding consortia, until after the auction. Applicants could modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes would not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas.[143] In addition, applications that are not signed would be dismissed as unacceptable.

106. Upon reviewing the short-form applications, we propose to issue a public notice listing all defective applications and applicants with minor defects would be given an opportunity to cure and resubmit a corrected version. After reviewing the corrected applications, the Commission would release a second public notice announcing the names of all applicants whose applications have been accepted for filing. These applicants would be required to submit an upfront payment to the Commission, as discussed below, to the Commission's lock-box by the date specified in the Public Notice, which generally would be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission would issue a third public notice announcing the names of all applicants that have been determined as qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned would not be identified on this Public Notice as a qualified bidder. Each applicant listed on this public notice would be issued a bidder identification number and further information and instructions regarding auction procedures. We seek comment on the proposals discussed above.

3. Upfront Payments

107. We concluded in the *Auctions Second Report & Order* that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate.[144] By requiring such a payment, we also help to ensure that any bid withdrawal or default penalties are paid. We tentatively conclude that the standard upfront payment formula of $0.02 per MHz-pop, based on the number of 10-channel blocks in each MTA identified by an applicant on its Form 175, is appropriate for the 900 MHz SMR

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[142] Commission Announces that Mutually Exclusive "Short Form" Applications (Form 175) to Participate in Competitive Bidding Process ("Auctions") are Treated as Exempt for *Ex Parte* Purposes, *Public Notice*, 9 FCC Rcd 6760 (1994).

[143] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion & Order*, PP Docket No. 93-253, 9 FCC Rcd 7345 (1994) (*Auctions Second Memorandum Opinion & Order)* at ¶ 52.

[144] *Auctions Second Report & Order* at ¶ 171.

service.[145] Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses (*i.e.*, MTAs with fewer pops), or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. If licenses covering the nation are being auctioned simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intended to bid on licenses covering the entire nation in a single bidding round. The $0.02 per MHz-pop formula also works well with the Milgrom-Wilson activity rule that we propose to employ in the 900 MHz SMR auction, as described in ¶¶ 87-93, *supra*. In the initial Public Notice issued prior to the auction, we would announce population information corresponding to each license to enable bidders to calculate their upfront payments. We seek comment on these proposals.

4. Down Payment and Full Payment

108. In the *Auctions Second Report & Order*, we established a 20 percent down payment requirement for winning bidders to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.[146] We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while not being so onerous as to hinder growth or diminish access.[147] We also determined that this amount was appropriate for the broadband PCS auctions.[148] We believe that the reasoning employed in those Orders is equally applicable to the 900 MHz SMR service. Thus, we tentatively conclude that, with the exception of designated entities eligible for installment payments (as proposed at ¶¶ 135-140, *infra*), winning bidders in 900 MHz SMR auctions must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). Under this proposal, if the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit would be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies would be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder would be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the penalty, any excess deposit would be refunded. Upfront payments would be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to

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[145] Each 10-channel block accounts for .025 MHz.

[146] *Auctions Second Report & Order* at ¶ 190.

[147] *Id.*

[148] *See Auctions Fifth Report & Order* at ¶ 73.

acquire. We seek comment on these proposals.

109. We propose to require winning bidders to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding. All auction winners generally would be required to make full payment of the balance of their winning bids within five (5) business days following Public Notice that the license is ready for grant. Under this proposal the Commission would grant the license within ten (10) business days after receiving full payment. We seek comment on this proposal.

110. We propose to subject an auction winner that is eligible to make payments through an installment plan (*i.e.*, designated entities, as proposed at ¶¶ 133-134, *infra*) to different payment requirements. Such an entity would be required to bring its deposit with the Commission up to five percent of its winning bid after the bidding closes, and would have to pay an additional five percent of its winning bid to the Commission within five (5) business days following public notice that the license is ready for grant. The Commission would then grant the license within ten (10) business days after receiving the five percent payment.

5. Bid Withdrawal, Default and Disqualification

111. As we have determined in the *Auctions Second Report & Order*, there must be a substantial penalty assessed to bidders if they withdraw a high bid, are found not to be qualified to hold licenses, or default on payment of a balance due. Although we concluded that payment of *all* amounts that a bidder has on deposit may be too severe in many cases, we devised alternative disincentives for withdrawal, default, or disqualification.[149] We tentatively conclude that these procedures, found in Sections 1.2104(g) and 1.2109 of the Commission's Rules, are appropriate for the 900 MHz SMR auction as well. Accordingly, we propose that any bidder that withdraws a high bid during an auction before the Commission declares bidding closed would be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid. We seek comment on this proposal.

112. If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. Under our proposal, if the subsequent high bidder also withdraws its bid, that bidder would be required to pay a penalty equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead

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[149] *See Auctions Second Report & Order* at ¶ 197.

offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we propose not to hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

113. After bidding closes, we propose to assess a defaulting auction winner an additional payment of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less.[150] The additional three percent payment is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. Under this proposal, we would hold deposits made by defaulting or disqualified auction winners until full payment.

114. We believe that these payment requirements will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.[151]

115. If the MTA winner defaults, is otherwise disqualified after having made the required down payment, or the license is terminated or revoked, then we tentatively conclude that the Commission will re-auction the license.[152] Under this proposal, if the default occurs within five business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels. If only a small number of relatively low-value licenses are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders if the cost of running another auction exceeds the benefits. We seek comment on the proposals discussed above.

6. Long-Form Applications

116. If the winning bidder makes the down payment in a timely manner, we propose the following procedures: A long-form application filed on FCC Form 600 must be filed by a date specified by Public Notice, generally within ten (10) business days after the close of bidding. After the Commission receives the winning bidder's down payment and long-form

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[150] *See* 47 C.F.R. §§ 1.2104(g), 1.2109.

[151] *See Auctions Second Report & Order* at ¶ 198.

[152] *See id.* at ¶ 204.

application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the Form 600, designated entities will be required to submit evidence to support their claim to any special provision available for designated entities described in this Order. This information may be included in an exhibit to FCC Form 600. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility for bidding credits, installment payment options, and other special provisions. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otnerwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.[153] We seek comment on this proposal.

7. Petitions to Deny and Limitations on Settlements

117. As we have determined, the petition to deny procedures in Section 90.163 of the Commission's Rules, adopted in the *CMRS Third Report & Order* will apply to the processing of applications for the 900 MHz SMR service. Thus, a party filing a petition to deny against a 900 MHz SMR application will be required to demonstrate standing and meet all other applicable filing requirements. We have also adopted "greenmail" restrictions in Section 90.162 to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from 900 MHz SMR applicants. Thus, we will limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

118. With respect to petitions to deny, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination.[154] In the event the Commission identifies substantial and material issues of fact, Section 309(i)(2) of the Communications Act permits the submission of all or part of evidence in written form in any hearing and allows employees other than administrative law judges to preside over the taking of written evidence.

8. Transfer Disclosure Requirements

119. In Section 309(j), Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."[155] In the *Auctions Second Report & Order*, the Commission adopted safeguards

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[153] *See generally* 47 C.F.R. §§ 90.163-90.166.

[154] *Auctions Second Report & Order* at ¶ 202.

[155] 47 U.S.C. § 309(j)(4)(E).

designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied.[156] We decided that it was important to monitor transfers of licenses awarded by competitive bidding to accumulate the necessary data to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license."[157] Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not.[158]

120. We tentatively conclude that the transfer disclosure requirements of Section 1.2111(a) should apply to all 900 MHz SMR licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant would be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. As we indicated in the *Auctions Second Report & Order*, we would give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, so that we may determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context.[159]

9. Performance Requirements

121. The Budget Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[160] In the *Auctions Second Report & Order*, we decided it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. We tentatively conclude that the coverage requirements that we adopt in this Order for the 900 MHz SMR service (discussed at ¶¶ 38-43, *supra*) are sufficient to address the spectrum warehousing concern. As discussed *infra*, failure to meet these requirements will result in automatic cancellation of license. Accordingly, propose to adopt no additional performance requirements for the 900

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[156] *Auctions Second Report & Order* at ¶¶ 210-226, 258-265.

[157] *See* House Report at 257; *Auctions Second Report & Order* at ¶ 214.

[158] *See* 47 C.F.R. § 1.2111(a).

[159] *See Auctions Second Report & Order* at ¶ 214. We note that these transfer disclosure requirements are in addition to the unjust enrichment provisions discussed in this Order at ¶¶ 143-144, *infra*.

[160] Budget Act, § 6002 (a), 107 Stat. 312 (1993), 47 U.S.C. § 309(j)(4)(B).

MHz SMR service. We seek comment on this proposal.

D. Treatment of Designated Entities

1. Overview and Objectives

122. Congress provided that, in developing competitive bidding procedures, the Commission shall consider various congressional objectives and consider several alternative methods for achieving them. Specifically, the auction statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[161] Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."[162] Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."[163] The statute also requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[164] To achieve this goal, the statute indicates that the Commission should "consider the use of tax certificates, bidding preferences, and other procedures."[165]

123. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the problems that designated entities would have in competing against large, well-capitalized companies in auctions and the difficulties they encounter in accessing capital. For example, the legislative history accompanying our grant of auction authority states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned

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[161] 47 U.S.C. § 309(j)(3)(B).

[162] *Auctions Second Report and Order* at ¶ 227.

[163] 47 U.S.C. § 309(j)(4)(A).

[164] 47 U.S.C. § 309(j)(4)(D).

[165] *Id.*

by members of minority groups and women."[166] The House Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries."[167] More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations to ensure that small businesses would "continue to have opportunities to become licensees."[168]

124. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments were clearly intended to assist small businesses. The House Report states that these related provisions were drafted to "ensure that all small businesses will be covered by the Commission's regulations, including those owned by members of minority groups and women."[169] It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."[170]

125. In addition, with regard to access to capital, Congress had made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."[171] As a result of these difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."[172]

126. In our initial implementation of Section 309(j) of the Communications Act, we established in the *Second Report & Order* eligibility criteria and general rules that would govern the special measures for designated entities. We also identified several measures,

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[166] House Report at 254.

[167] *Id.*

[168] *Id.* at 255.

[169] *Id.*

[170] *Id.*

[171] Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a)(3), Pub. Law 102-366, Sept. 4, 1992.

[172] § 331(b)(2),(3).

including installment payments, spectrum set-asides, bidding credits and tax certificates, from which we could choose in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

127. We have employed a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to designated entities in other spectrum-based services. For instance, we determined that minority-owned and women-owned businesses in the nationwide narrowband PCS auction would receive a 25 percent bidding credit on certain channels[173] in the regional narrowband PCS auction women-owned and minority-owned businesses would receive a 40 percent bidding credit on certain channels and small businesses would be eligible for installment payments on all channels;[174] in the broadband PCS auction, on separate entrepreneurs' blocks, the bidding credits would vary according to the type of qualifying designated entity that applied (*i.e.*, a small business would receive a 10 percent bidding credit, a business owned by minorities and/or women would receive a 15 percent bidding credit, and a small business owned by women and/or minorities would receive an aggregated bidding credit of 25 percent),[175] and all entrepreneurs' block licensees would be eligible for varying degrees of installment payments.[176] For the Interactive Video and Data Service (IVDS), we adopted a 25 percent bidding credit for one license in each market for women-owned and minority-owned businesses[177] and installment payments for small businesses.[178] The measures adopted thus far for each service were established after closely examining the specific characteristics of the service and determining whether any particular barriers to accessing capital stood in the way of designated entity opportunities. After examining the record in the competitive bidding proceeding in PP Docket 93-253, we

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[173] *Auctions Third Report and Order* at ¶ 72.

[174] *Id.* at ¶ 87. *See* implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175 (1994) at ¶ 58.

[175] *Auctions Fifth Report & Order* at ¶ 133. *See also Auctions Fifth Memorandum Opinion & Order* at ¶ 99.

[176] *Auctions Fifth Memorandum Opinion & Order* at ¶ 103.

[177] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994)(*Auctions Fourth Report & Order*) at ¶ 39.

[178] *Id.* at ¶ 53.

established provisions necessary to enable designated entities to overcome the barriers to accessing capital in each particular service. Moreover, the measures we adopted also were designed to increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services.

128. As in other auctionable services, we fully intend in the 900 MHz SMR service to meet the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Accordingly, in balancing the congressional objectives set forth in the auction statute, we tentatively conclude that bidding credits, reduced down payments and installment payments should be made available to small businesses -- including those owned by minorities and women and small rural telephone companies -- on all 900 MHz SMR channel blocks in each MTA. In addition, to facilitate the introduction of service to rural areas, we propose to allow rural telephone companies to obtain geographically partitioned 900 MHz SMR licenses in areas where they provide telephone service, similar to the program adopted in broadband PCS.[179]

2. Bidding Credits

129. Bidding credits allow eligible designated entities to receive a payment discount for their winning bid in an auction. In the *Auctions Second Report & Order*, we determined that competitive bidding rules applicable to individual services would specify the designated entities eligible for bidding credits and the amounts of the available bidding credits for that particular service.[180] In the *Auctions Third Report & Order*,[181] we determined that eligible designated entities in the nationwide narrowband PCS auction would receive a 25 percent bidding credit. In the regional narrowband PCS auction designated entities would receive a 40 percent bidding credit.[182] For broadband PCS, the bidding credits would vary according to the type of qualifying designated entity that applied (*i.e.*, a small business received a 10 percent bidding credit, a business owned by minorities and/or women received a 15 percent bidding credit, and a small business owned by women and/or minorities received an aggregated bidding credit of 25 percent).[183] For the Interactive Video and Data Service

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[179] *Auctions Fifth Report and Order* at ¶¶ 148-153.

[180] *Auctions Second Report & Order* at ¶ 241.

[181] *Auctions Third Report & Order* at ¶ 72.

[182] *Auctions Third Memorandum Opinion &Order & Further Notice* at ¶ 58.

[183] *Auctions Fifth Report & Order* at ¶ 133. *See also Auctions Fifth Memorandum Opinion & Order* at ¶ 99.

(IVDS), we adopted a 25 percent bidding credit in each market for women-owned and minority-owned businesses.[184]

130. We propose to offer a 10 percent bidding credit to small businesses bidding on any of the ten-channel blocks within each MTA. We believe these bidding credits will help, along with other provisions proposed below, achieve the objectives of Congress by providing small businesses, including women-owned and minority-owned small businesses, with a meaningful opportunity to obtain licenses in the 900 MHz SMR auction, while taking into account the concerns of incumbents within the DFAs. While some discount is needed to put small businesses on equal footing with other larger applicants, considering the large number of licenses available in this service (*i.e.*, 1,020), we believe it may be unnecessary to provide a higher bidding credit, such as that provided for certain designated entities in regional narrowband PCS.[185] In narrowband PCS and broadband PCS, we limited the channel blocks on which bidding credits were available to designated entities.[186] In IVDS, we permitted the use of bidding credits on both available channels, yet imposed a limit of one bidding credit per service area.[187] Due to the characteristics of the 900 MHz SMR service, we are proposing a departure from these other service-specific auction rules. We propose to offer bidding credits for eligible designated entities on all channel blocks in each MTA, rather than limiting this measure to certain blocks. Due to the presence of incumbents throughout all blocks, it may be impractical to choose certain blocks for bidding credits that would not affect the incumbents occupying those blocks. Additionally, we believe that we would be providing greater opportunities for small businesses if we provide bidding credits across all blocks.

131. We seek comment on this proposal. Specifically, is a 10 percent credit sufficient to enhance bidding opportunities? Also, how should the presence of incumbents on all channel blocks affect the availability of bidding credits on all blocks? We observe that in auctions conducted to date, bidding credits have been available for women and minority-owned applicants, with installment payments available for both women and minority-owned businesses and small businesses. The Commission has adopted a 10 percent bidding credit for broadband PCS applicants on the C and F blocks.[188] In auctions where bidding credits for women and minorities have been available, participation and success in spectrum-based auctions have varied. For example, in nationwide narrowband PCS, a 25 percent bidding

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[184] *Auctions Fourth Report & Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) at ¶ 39.

[185] *Auctions Third Memorandum Opinion &Order & Further Notice* at ¶ 58.

[186] *Auctions Third Report and Order* at ¶ 72 (narrowband PCS); *Auctions Fifth Report & Order* at ¶ 131 (broadband PCS).

[187] *Auctions Fourth Report & Order* at ¶ 39.

[188] *Auctions Fifth Report and Order* at ¶ 130.

credit did not produce successful bidders among women and minority-owned applicants. In regional narrowband PCS, four of the nine winning bidders relied on a 40 percent bidding credit and installment payments to obtain licenses. Our auction experience has to date not included our current proposal to provide a small business bidding credit available on all blocks.

132. As discussed above, we propose to limit eligibility for bidding credits to small businesses and we also seek comment on whether this eligibility should be expanded to include businesses owned by minorities and/or women, even if they do not fall within our small business size standards for 900 MHz SMRs. In the event that we modify our bidding credit eligibility proposal to include minority and women-owned businesses, we also seek comment on a second bidding credit alternative, which would entitle small businesses, and minority and women-owned businesses to receive bidding credits on the five least encumbered blocks in each MTA.[189] In the event that we adopt our proposal to limit bidding credits to small businesses, should we also limit availability of the credit to the channel blocks with the fewest incumbents, or would this limitation dilute the effectiveness of a small business credit as a means of attracting broad designated entity participation in the 900 MHz SMR service? What bidding credit amounts should apply to women and minority-owned businesses and small businesses? Should women-owned and minority-owned businesses that are also small businesses receive an aggregated bidding credit? We seek comment on the ramifications of each proposal for the incumbents in each block. Finally, we seek comment on any possible alternative bidding credit schemes.

3. Reduced Down Payments/Installment Payments

133. We propose to adopt an installment payment option for small businesses that are winning bidders in the 900 MHz SMR auction. As we noted in the *Auctions Second Report & Order*, allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses, especially those owned by minorities and/or women.[190] Under this proposal, licensees who qualify for installment payments would be entitled to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this proposed rule, qualified licensees would make interest-only payments during the first two years of the license term.[191] Timely payment of all installments would be a condition of the license grant and failure to make such timely payment would be grounds for revocation of the license.

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[189] RAM and Geotek generally support this model of limiting bidding credits to certain blocks. *See* RAM/Geotek Joint *ex parte* Presentation at 4.

[190] *Auctions Second Report & Order* at ¶¶ 231-232.

[191] *See, e.g., Auctions Fifth Report & Order* at ¶ 138-139.

134. Additionally, we tentatively conclude that small businesses that are eligible for installment payments may pay a reduced down payment (five percent of the winning bid) five days after the auction closes, with the remaining five percent down payment due five days after Public Notice that the license is ready for grant. Under this proposal, the Commission would grant the license within ten (10) business days after receiving such down payment. We seek comment on these payment procedures. If we expand our installment payment eligibility proposal to women-owned and minority-owned entities, should we also provide them with reduced down payments provisions and, if so, on what terms? In the event we adopt provisions for minority and women-owned applicants, should enhanced installment payments be made available?

4. Eligibility for Bidding Credits, Installment Payments and Reduced Down Payments

135. We propose to limit eligibility for bidding credits, installment payments and reduced down payments to small businesses, including those owned by members of minority groups and women and those rural telephone companies that meet our small business size standards. As discussed below, we propose to define small businesses as those entities with less than $3 million in average gross revenues for the preceding three years. We do not believe that it is necessary to develop different eligibility criteria for minority and women-owned entities that do not meet our small business size standards in order to achieve the goals of Section 309(j) in the 900 MHz SMR service. Nor do we believe that enhanced bidding credits or other measures for small businesses owned by minorities and/or women are necessary for this service. We believe that providing credits on all blocks and lowering the gross revenue threshold for small businesses, as discussed in ¶ 130, *supra*, will, in turn, create even more opportunities for minorities and women. For example, U.S. Census Data shows that approximately 99% of all women-owned businesses and 99% of all minority-owned businesses generated net receipts of $1 million or less.[192] Thus, we expect that we will capture the majority of minority and women-owned businesses within this category. Moreover, in light of Congress's instruction to "design and test multiple alternative methodologies"[193] we believe that the 900 MHz SMR service may be a suitable service in which to test more uniform measures, because capital entry requirements are expected to be lower than PCS and the spectrum is contaminated by incumbents who will not be required to relocate.

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[192] *Women-Owned Businesses*, WB 87-1, 1987 Economic Census, p. 144, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, pp 81-82, Table 8. For purposes of this data, these are entities that earned at least $500 and filed an IRS Form 1040, Schedule C, and in which at least 51% of the assets are owned by minorities or women. The definition of minorities is the same as that on which we seek comment here. (*See* proposed § 90.814(f)).

[193] 47 U.S.C. § 309(j)(3).

136. In designing our auction rules for broadband PCS, we observed that the different capital requirements of each spectrum-based service would influence our decision as to the types of provisions necessary for designated entities.[194] In that context, we decided that lack of access to capital for women and minorities becomes especially problematic for very costly spectrum-based services, such as broadband PCS[195] and nationwide narrowband PCS. As a result, we found that women and minorities could not overcome their difficulties in accessing capital without additional provisions.[196] We also decided that such targeted provisions may not be necessary in other less costly spectrum-based services.[197] Our expectation is that while 900 MHz MTA service may be a capital-intensive undertaking, it should require considerably less capital than PCS, thereby providing greater opportunities for participation by smaller businesses, including those owned by women and minorities. However, to enhance our understanding of the capital requirements the 900 MHz SMR service is likely to entail, we seek comment on the projected costs associated with acquisition, construction and operation of 900 MHz MTA licenses. In addition, to gain some insight into whether the level of small business participation in the current 900 MHz SMR service has resulted in opportunities for women and/or minority-owned businesses to play a meaningful role in this service, we ask for comment on the composition of existing 900 MHz SMR providers. What proportion of existing 900 MHz SMR businesses are owned by women or minorities? In this respect, we observe that the 900 MHz networks built by RAM and Geotek have relied to a certain extent upon entering into management agreements with local 900 MHz SMR operators.[198] We ask for comment as to what extent participants in 900 MHz SMR networks have been small businesses owned by minorities and women. What is the likelihood that such management agreements are likely to serve as a vehicle for participation in the 900 MHz SMR service by minority and women-owned businesses?

137. Whether or not we adopt our proposal only for small businesses, we intend to continue to request bidder information on the short-form filings as to minority and/or women-owned status, and, in analyzing the applicant pool and the auction results, we will monitor whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses. This will also assist us in preparing our report

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[194] *Auctions Fifth Report & Order* at ¶ 96.

[195] In the *Auctions Fifth Report & Order*, for example, we decided it was necessary to do more for minorities and women in an extremely capital-intensive service such as broadband PCS. *Id.* at ¶¶ 96 and 113.

[196] *Id.* at ¶¶ 96, 101.

[197] *Id.* at ¶ 96.

[198] *PowerSpectrum, Inc.*, 8 FCC Rcd 4452 (1993) at ¶ 7; *American Mobile Data Communications, Inc.*, 4 FCC Rcd 3802 (1989) at ¶¶ 5, 20.

to Congress on the success of designated entities in auctions.[199] If bidding credits only for small businesses proves unsuccessful in encouraging licenses won by a significant number of women and minority-owned entities, we retain discretion to tailor our approach for future auctions. We seek comment on this monitoring proposal.

138. Small Business Definition. In the *Auctions Second Memorandum Opinion & Order*, we stated we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.[200] With respect to eligibility in the 900 MHz auction for provisions available to small businesses, we believe that, because the 900 MHz SMR service is expected to be less capital-intensive than broadband PCS and regional narrowband PCS, where we adopted a $40 million threshold,[201] and it encompasses a smaller amount of spectrum than PCS and less area than regional narrowband PCS, a much lower gross revenue threshold is warranted. Therefore, we propose to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than $3 million. We believe this standard is appropriate for 900 MHz SMR service because build-out costs are likely to be much lower than those for broadband PCS and regional narrowband PCS. Additionally, the license supply (1,020) is more abundant and we believe that the costs of acquiring a 900 MHz SMR license are lower than for broadband or narrowband regional PCS licenses. We believe that many of the incumbents already licensed in the 900 MHz SMR service will fall within the $3 million definition of small business.[202]

139. This small business definition is a variation of the definition used for broadband PCS,[203] and is generally supported by AMTA.[204] We seek comment on this proposal. Is this an appropriate threshold? Should it be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed here? We also tentatively conclude that we will consider the revenues of affiliates and certain investors and we propose to apply the 25 percent attribution threshold and affiliation rules similar to whose used in the PCS

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[199] *See* 47 U.S.C. § 309(j)(12)(D).

[200] *Auctions Second Memorandum Opinion & Order* at ¶ 145.

[201] *Auctions Fifth Report & Order* at ¶ 175; *Auctions Third Memorandum Opinion & Order & Further Notice at* ¶ 46.

[202] AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 3.

[203] *Auctions Fifth Report & Order* at ¶ 175.

[204] AMTA *Ex Parte* Letter, filed Mar. 23, 1995, at 2-3.

auction rules.[205] In other words, we will not attribute the gross revenues of investors that hold less than a 25 percent interest in the applicant, but we will include the gross revenues of the applicant's affiliates and investors with ownership interests of 25 percent or more in the applicant in determining whether an applicant qualifies as a small business. Is a different attribution threshold warranted for the 900 MHz SMR service? We seek comment on these issues.

140. If we adopt separate provisions for minority-owned and women-owned entities, we also seek comment on whether we should adopt the definition of minority-owned businesses and women-owned businesses contained in Section 1.2110(b)(2) of the Commission's rules, *i.e.*, businesses in which minorities and /or women who control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. Under this rule, every general partner in a partnership either must be a minority and/or woman who individually or together own at least 50.1 percent of the partnership equity.[206]

5. Transfer Restrictions and Unjust Enrichment Provisions

141. In the *Auctions Fifth Report & Order*, we adopted restrictions on the transfer or assignment of licenses to ensure that designated entities do not take advantage of special provisions by immediately assigning or transferring control of their licenses.[207] We propose to adopt these restrictions on transfer and assignment of licenses won by designated entities. Under this proposal, a designated entity would be prohibited from voluntarily assigning or transferring control of its license to any other entity during the three years after license grant.[208] In addition, in the fourth and fifth years of the license term, the designated entity would only be able to assign or transfer control of its license to another qualified designated entity.[209] Finally, if a designated entity were to assign or transfer its license during years four or five of the license term, no unjust enrichment could be gained through the transfer. Therefore, if the entity to which the designated entity transfers/assigns the license is not eligible for the same provisions, then the difference would have to be paid back to the U.S. Treasury as a condition of approval of the transfer or assignment.[210] We seek comment on these proposals.

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[205] *See, e.g.*, 47 C.F.R. §§ 24.320(b)(2)(iv); 24.720(j)(1).

[206] *See id.* § 1.2110(b)(2).

[207] *Auctions Fifth Report & Order* at ¶ 128.

[208] *Id.*

[209] *Id.*

[210] *Id.* at ¶ 134.

142. For the remainder of the license term, we propose to continue to impose unjust enrichment rules on designated entities. The Commission's unjust enrichment provisions are integral to the success of the special provisions provided to designated entities in the various auctionable services. In the *Auctions Second Report & Order,* we outlined unjust enrichment provisions applicable specifically to designated entities. We established these provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit.[211]

143. Under this proposal, licensees seeking to transfer their licenses for profit, as a condition to approval of the transfer, would have to remit to the government a payment equal to a portion of the total value of the benefit conferred by the government. Therefore, if a designated entity making installment payments sells its license to an entity that does not qualify as a designated entity, we would require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer.[212] If a transfer is made to another eligible designated entity, no penalty would be assessed against the original designated entity license holder. If bidding credits were awarded to a licensee, we will require the licensee seeking approval for a transfer of control or an assignment of license to a non-designated entity, or who proposes to take any other action relating to ownership or control that would result in loss of status as an eligible designated entity, to reimburse the government for the amount of the bidding credit before transfer of the license will be permitted.[213] We propose to apply these payment requirements for the entire license term to ensure that designated entities will look first to other designated entities, when deciding to transfer their licenses. We seek comment on this proposal.

6. Rural Telephone Company Partitioning

144. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies have the opportunity to participate in the provision of spectrum-based services. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority or economically feasible for many licensees. Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas. Therefore, we propose a geographic partitioning scheme similar to that adopted in broadband PCS,[214] which will encourage participation by rural telephone companies, thereby increasing the likelihood of rapid introduction of service to rural areas.

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211 *Auctions Second Report and Order* at ¶ 259.

212 *See, e.g., id.* § 24.711(c)(1).

213 *See, e.g.,* 47 C.F.R. § 24.712(d)(2).

214 *Auctions Fifth Report and Order* at ¶ 150.

145. This partitioning scheme would prevent rural telephone companies from having to bid on the entire MTA license to obtain licenses covering their wireline service areas. In addition, partitioning would provide rural telephone companies with the flexibility to be able to serve areas in which they already provide service, while the remainder of the service area could be served by other providers.[215] Under this proposal, rural telephone companies would be permitted to acquire partitioned 900 MHz SMR licenses in either of two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned 900 MHz SMR licenses from other licensees through private negotiation and agreement either before or after the auction.[216] We would also require that partitioned areas conform to established geopolitical boundaries and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the service area.[217] We also propose to use the definition for rural telephone companies implemented in the *Auctions Fifth Report & Order* for broadband PCS. Rural telephone companies would be defined as local exchange carriers having 100,000 or fewer access lines, including all affiliates.[218] We seek comment on this proposal.

7. Other Provisions

146. Reduced Upfront Payments. We propose not to adopt a reduced upfront payment option in the 900 MHz SMR service for designated entities. Considering the other provisions adopted here (*i.e.*, bidding credits, installments payments and reduced down payments) we believe a reduced upfront payment option is unnecessary and, in the absence of an entrepreneur's block, may be too costly to administer in the 900 MHz SMR service. Moreover, we want to ensure sincere bidding by all parties. We seek comment on this proposal. If we adopt provisions for minority and women-owned entities, should we apply a reduced upfront payment provision to those entities only?

147. Set-aside Spectrum. In the *Auctions Fifth Report & Order* we established entrepreneurs' blocks on which only qualified entrepreneurs, including designated entities, could bid.[219] We tentatively conclude not to adopt an entrepreneurs' block for the 900 MHz SMR auction for several reasons. First, the large numbers of licenses available and relatively small spectrum allocations in the 900 MHz SMR service should allow for extensive small

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[215] *Id.*

[216] *Id.* at ¶ 151.

[217] *Id.*

[218] *Id.* at ¶ 193.

[219] *Id.* at ¶¶ 113-123. These rules were further refined in the *Auctions Fifth Memorandum Opinion & Order*. *See* 47 C.F.R. § 24.709.

business participation. Second, unlike broadband PCS, we do not believe that the effectiveness of bidding credits, reduced down payments and installment payments will be diluted, due to the smaller capital outlay anticipated for this service. Third, it may be impractical to choose particular blocks to set aside for bidding solely by entrepreneurs, because each of the 20 channel blocks is encumbered in approximately 19 of the 46 DFAs.[220] We request comment on this proposal. Are the capital requirements of this service anticipated to be so substantial that we should insulate certain blocks from very large bidders in order to provide meaningful opportunities for designated entities?

VI. CONCLUSION

148. We believe that the service rules adopted in this Order and the auction proposals set forth for 900 MHz SMR licenses in the Further Notice will promote the public policy goals set forth by Congress. The rules and proposals should facilitate the rapid implementation of the 900 MHz SMR service, thus advancing the public interest by fostering economic growth of new competitive new services via efficient spectrum use. The proposed rules will allow the public to recover a portion of the value of the public spectrum, and will promote access to 900 MHz SMR services by consumers, producers, and new entrants by ensuring that designated entities will have genuine opportunities to participate in the auctions and in the provision of service. At the same time, we believe that the technical rules adopted and clarified herein strike the proper balance between the rights of incumbent licensees in the 900 MHz SMR spectrum, and new MTA licensees.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

149. With respect to this Second Report & Order, pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking inGN Docket No. 93-252. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

150. Need for and purpose of the action. This rulemaking proceeding was initiated to implement Sections 332 and 3(n), respectively, of the Communications Act, as amended. The rules adopted herein will carry out Congress's intent to establish a consistent regulatory framework for all commercial mobile radio service (CMRS).

151. Issues raised in response to the IRFA. No comments were submitted in response to the IRFA inGN Docket No. 93-252.

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[220] *See also* RAM/Geotek Supplementary Joint *Ex Parte* Presentation at 1.

152. Significant alternatives considered and rejected. All significant alternatives have been addressed in the *Second Report & Order*, and the *CMRS Third Report & Order*.

153. With respect to this Second Further Notice of Proposed Rulemaking, an Initial Regulatory Flexibility Analysis is contained in Appendix B. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et. seq.* (1981).

B. Ex Parte Rules--Non-Restricted Proceeding

154. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

C. Comment Dates

155. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 24, 1995, and reply comments on or before June 1, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

156. Authority for issuance of this Second Further Notice of Proposed Rule Making is contained in Section 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

157. Accordingly, IT IS ORDERED that Part 90 of the Commission's Rules is amended as set forth in the attached Appendix A.

158. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

E. Contact Person

159. For further information concerning this proceeding, contact David Furth or Rosalind K. Allen at (202) 418-0620 (Wireless Telecommunications Bureau, Commercial Wireless Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
FINAL RULES

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 -- PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 is revised to read as follows:

Authority: Sections 4, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, 309 and 332, unless otherwise noted.

2. Section 90.7 is amended by adding the definition for "MTA license" following the definition for "Mobile station" to read as follows:

§ 90.7 Definitions.

* * * * *

MTA-based license or *MTA license*. A license authorizing the right to use a specified block of SMR spectrum within one of the 51 Major Trading Areas ("MTAs"), as embodied in Rand McNally's Trading Area System MTA Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide* (the "MTA Map.") The MTA Listings, the MTA Map and the Rand McNally/AMTA license agreement are available for public inspection at the Wireless Telecommunications Bureau's public reference room, Room 628, 1919 M Street N.W. Washington D.C. 20554.

* * * * *

3. Section 90.617 is amended by revising paragraph (d), introductory text, to read as follows:

§ 90.617 Frequencies in the 809.750-824/854.750-869 MHz, and 896-901/935-940 MHz bands available for trunked or conventional system use in non-border areas.

* * * * *

(d) The channels listed in Tables 4A and 4B are available only to eligibles in the SMR category, which consists of Specialized Mobile Radio (SMR) stations and eligible end users. The frequencies listed in Table 4B are available to SMR eligibles desiring to be authorized on MTA service areas in accordance with Section 90.661. SMR licensees licensed on the channels listed in Table 4B on or before August 9, 1994 may continue to utilize these frequencies within their existing service areas, as provided in Section 90.661. This paragraph

deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87 miles) from the U.S./Canada border. See § 90.619 for the assignment of SMR frequencies in these border areas. For stations located within 113 km (70 miles) of Chicago, channels 401-600 will be assigned in groups as outlined in Table 4C.

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4. Section 90.631 is amended by revising paragraphs (f) and (i) to read as follows:

§ 90.631 **Trunked systems loading, construction and authorization requirements.**

* * * * *

(f) If a station is not placed in permanent operation, in accordance with the technical parameters of the station authorization, within one year, except as provided in § 90.629, its license cancels automatically and must be returned to the Commission. For purposes of this section, a base station is not considered to be placed in operation unless at least two associated mobile stations, or one control station and one mobile station, are also placed in operation. An SMR licensee with facilities that have discontinued operations for 90 continuous days is presumed to have permanently discontinued operations, unless the licensee notifies the FCC otherwise prior to the end of the 90 day period and provides a date on which operation will resume, which date must not be in excess of 30 additional days.

* * * * *

(i) For SMRS category trunked systems licensed in the 896-901/935-940 MHz band (other than MTA-licensed systems), if at the end of the initial five-year license term the licensee of such a trunked system has not satisfied the loading requirements of paragraph (b) of this section, the licensee requesting renewal of its license will be granted a renewal for only a two-year period. Regardless of the date of grant of the two-year renewal, the licensee will be required to comply fully with the minimum requirements set forth in paragraph (b) of this section at the end of the two-year renewal term. As an exception to this requirement, if the licensee obtains the MTA license covering its assigned spectrum in accordance with Sections 90.661 through 90.671, these loading requirements will no longer be applicable and the coverage requirements of Section 90.665 will govern.

5. Subpart S is amended by adding a new heading following Section 90.659 to read as follows:

POLICIES GOVERNING THE LICENSING AND USE OF MTA-BASED SMR SYSTEMS IN THE 896-901/935-940 MHZ BAND.

6. A new Section 90.661 is added to Subpart S to read as follows:

§ 90.661 MTA-based SMR service areas.

MTA licenses for SMR spectrum blocks in the 896-901/935-940 MHz band listed in Table 4B of Section 90.617(d) are available in 51 Major Trading Areas (MTAs) as defined in Section 90.7. Within these MTAs, licenses will be authorized in ten channel blocks as specified in Table 4B of Section 90.617(d) through the competitive bidding procedures described in Subpart U of this Part.

7. A new Section 90.663 is added to Subpart S to read as follows:

§ 90.663 MTA-based SMR system operations.

(a) MTA-based licensees authorized in the 896-901/935-940 MHz band pursuant to Section 90.661 may construct and operate base stations using any frequency identified in their spectrum block anywhere within their authorized MTA, provided that:

(1) The MTA licensee affords protection, in accordance with Section 90.621(b), to all sites for which applications were filed on or prior to August 9, 1994.

(2) The MTA licensee complies with any rules and international agreements that restrict use of frequencies identified in their spectrum block, including the provisions of Section 90.619 relating to U.S./Canadian and U.S./Mexican border areas.

(3) The MTA licensee limits its field strength at any location on the border of the MTA service area in accordance with Section 90.671 and masks its emissions in accordance with Section 90.669.

(b) In the event that the authorization for a previously authorized co-channel station within the MTA licensee's authorized spectrum block is terminated or revoked, the MTA licensee's co-channel obligations to such station will cease upon deletion of the facility from the Commission's licensing record. The MTA licensee then will be able to construct and operate base stations using such frequency.

8. A new Section 90.665 is added to Subpart S to read as follows:

§ 90.665 Authorization, construction and implementation of MTA licenses.

(a) MTA licenses in the 896-901/935-940 MHz band will be issued for a term not to exceed ten years.

(b) MTA licensees in the 896-901/935-940 MHz band will be permitted five years to construct their stations. This five-year period will commence with the issuance of the MTA-

wide authorization and will apply to all of the licensee's stations within the MTA spectrum block, including any stations that may have been subject to an earlier construction deadline arising from a pre-existing authorization.

(c) MTA licensees in the 896-901/935-940 MHz band must, within three years, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA within five years or, alternatively, submit a showing to the Commission demonstrating that they are providing substantial service.

(d) MTA licensees who fail to meet the coverage requirements imposed at either the third or fifth years of their construction period, or to make a convincing showing of substantial service, will forfeit their entire MTA license.

9. A new Section 90.667 is added to Subpart S to read as follows:

§ 90.667 Grandfathering provisions for incumbent licensees.

(a) These provisions apply to all 900 MHz SMR licensees who obtained licenses or filed applications on or before August 9, 1994 ("incumbent licensees"). An incumbent licensee's service area shall be defined by its originally-licensed 40 dBu signal strength contour. Incumbent licensees are permitted to add new transmit sites in this existing service area without prior notification to the Commission so long as their original 40 dBu signal strength contour is not expanded. Incumbents will be required to notify the Commission of any changes in technical parameters or additional stations constructed with a minor modification application. These minor modification applications will not be subject to public notice and petition to deny requirements or mutually exclusive applications.

(b) Applications in the 900 MHz SMR service for secondary sites filed after August 9, 1994 shall be authorized on a secondary, non-interference basis to MTA licensee operations. No secondary sites shall be granted on this basis in an MTA once the MTA licensee has been selected.

10. A new Section 90.669 is added to Subpart S to read as follows:

§ 90.669 Emission limits.

(a) On any frequency in an MTA licensee's spectrum block that is adjacent to a non-MTA frequency, the power of any emission shall be attenuated below the transmitter power (P) by at least 43 plus 10 $\log_{10}$(P) decibels or 80 decibels, whichever is the lesser attenuation.

NOTE: The measurements of emission power can be expressed in peak or average values, provided they are expressed in the same parameters as the transmitter power.

(b) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

11. A new Section 90.671 is added to Subpart S to read as follows:

§ 90.671 Field strength limits.

The predicted or measured field strength at any location on the border of the MTA service area for MTA licensees shall not exceed 40 dBuV/m unless all bordering MTA licensees agree to a higher field strength. MTA licensees are also required to coordinate their frequency usage with co-channel adjacent MTA licensees and all other affected parties. To the extent that a single entity obtains licenses for adjacent MTAs on the same channel block, it will not be required to coordinate its operations in this manner. In the event that this standard conflicts with the MTA licensee's obligation to provide co-channel protection to incumbent licensees under Section 90.621(b), the requirements of Section 90.621(b) shall prevail.

APPENDIX B
PROPOSED RULES

12. A new subpart U consisting of §§ 90.801 through 90.814 is proposed to be added to Part 90 to read as follows:

Subpart U -- Competitive Bidding Procedures for 900 MHz Specialized Mobile Radio

Sec.

90.801 900 MHz SMR subject to competitive bidding.
90.802 Competitive bidding design for 900 MHz SMR licensing.
90.803 Competitive bidding mechanisms.
90.804 Aggregation of 900 MHz SMR licenses.
90.805 Withdrawal, default and disqualification payments.
90.806 Bidding application (FCC Form 175 and 175-S Short-form).
90.807 Submission of upfront payments and down payments.
90.808 Long-form applications.
90.809 License grant, denial, default, and disqualification.
90.810 Bidding credits for small businesses.
90.811 Reduced down payment for licenses won by small businesses.
90.812 Installment payments for licenses won by small businesses.
90.813 Procedures for partitioned licenses.
90.814 Definitions.

§ 90.801 900 MHz SMR subject to competitive bidding.

Mutually exclusive initial applications to provide 900 MHz SMR service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 90.802 Competitive bidding design for 900 MHz SMR licensing.

The Commission will employ a simultaneous multiple round auction design when choosing from among mutually exclusive initial applications to provide 900 MHz SMR service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 90.803 Competitive bidding mechanisms.

(a) Sequencing. The Commission will establish and may vary the sequence in which 900 MHz SMR licenses will be auctioned.

(b) Grouping. All 900 MHz SMR licenses for each of the MTAs will be auctioned simultaneously, unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

(c) Minimum Bid Increments. The Commission will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) Stopping Rules. The Commission will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) Activity Rules. The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

§ 90.804 Aggregation of 900 MHz SMR licenses.

The Commission will license each 10-channel block in the 900 MHz SMR spectrum separately. Applicants may aggregate across spectrum blocks within the limitation specified in § 20.6(b) of this Chapter.

§ 90.805 Withdrawal, default and disqualification payments.

(a) During the course of an auction conducted pursuant to § 90.802, the Commission will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(b) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license if offered by the Commission. No withdrawal payment would be assessed if the subsequent winning bid exceeds the withdrawn bid. This payment amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(c) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (1) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

§ 90.806 Bidding application (FCC Form 175 and 175-S Short-form).

All applicants to participate in competitive bidding for 900 MHz SMR licenses must submit applications on FCC Forms 175 and 175-S pursuant to the provisions of § 1.2105 of this Chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of 900 MHz SMR licenses and, in the event that mutually exclusive applications

are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 900 MHz SMR auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed. In addition to identifying its status as a small business or rural telephone company, each applicant must indicate whether it is a minority-owned entity, as defined in § 90.814(g) and/or a women-owned entity.

§ 90.807 Submission of upfront payments and down payments.

(a) Bidders in the 900 MHz SMR auction will be required to submit an upfront payment of $0.02 per pop per MHz, in accordance with § 1.2106 of this Chapter.

(b) Winning bidders in a 900 MHz SMR auction must submit a down payment to the Commission in an amount sufficient to bring their total deposits up to 20 percent of their winning bids, and in accordance with § 1.2107(b) of this Chapter, except for small businesses that are winning bidders, which are governed by § 90.811.

§ 90.808 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 600 within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications on FCC Form 600 shall be submitted pursuant to the procedures set forth in 90.119 of this Part and any associated Public Notices. Only auction winners (and rural telephone companies seeking partitioned licenses pursuant to agreements with auction winners under § 90.813) will be eligible to file applications on FCC Form 600 for initial 900 MHz SMR licenses in the event of mutual exclusivity between applicants filing Form 175.

§ 90.809 License grant, denial, default, and disqualification.

(a) Except with respect to entities eligible for installment payments (see § 90.812) each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following Public Notice that the license is ready for grant. The Commission will grant the license within ten (10) business days after receipt of full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, will be subject to the payments specified in § 90.805 of this Part or § 1.2109 of this Chapter, as applicable.

(c) MTA licenses pursued through competitive bidding procedures will be granted pursuant to the requirements specified in § 90.166.

§ 90.810 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 90.814) may use a bidding credit of 10 percent to lower the cost of its winning bid on any of the blocks identified in § 90.617(d), Table 4B of this Part.
(b) Unjust Enrichment.

(1) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval of such assignment, transfer or other ownership change.

(2) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

§ 90.811 Reduced down payment for licenses won by small businesses.

Each winning bidder that qualifies as a small business shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five (5) business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five (5) business days following Public Notice that the license is ready for grant. The Commission will grant the license within ten (10) business days after receipt of the remainder of the down payment.

§ 90.812 Installment payments for licenses won by small businesses.

(a) Each licensee that qualifies as a small business may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this Chapter.
(b) Interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.
(c) Unjust Enrichment.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval.

§ 90.813 Procedures for partitioned licenses.

(a) Notwithstanding § 90.661, an applicant that is a rural telephone company, as defined in § 90.814, may be granted a 900 MHz SMR license that is geographically partitioned from a separately licensed MTA, so long as the MTA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the rural telephone company.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures --

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this Part and Part 1 of this Chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among rural telephone companies to partition the license pursuant to this section, if won at auction (*see* 47 CFR §1.2105(a)(2)(viii));

(2) Each rural telephone company that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 90.153.

(d) Each application for a partitioned area (long-form initial application or partial assignment application) shall contain a partitioning plan that must propose to establish a partitioned area to be licensed that meets the following criteria:

(1) Conforms to established geopolitical boundaries (such as county lines);

(2) Includes the wireline service area of the rural telephone company applicant; and

(3) Is reasonably related to the rural telephone company's wireline service area.

Note: A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

(e) Each licensee in each partitioned area will be responsible for meeting the construction requirements in its area (see § 90.665).

§ 90.814 Definitions.

(a) Scope. The definitions in this section apply to §§ 90.810 through 90.813, unless otherwise specified in those sections.

(b) Small Business: Consortium of Small Businesses.

(1) A small business is an entity that, together with its affiliates and persons or entities that

hold attributable interests in such entity and their affiliates, has average gross revenues for the three preceding years of less than $3 million.

(2) A small business consortium is conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraphs (b)(1) and (b)(2) of this section.

(c) *Rural Telephone Company.* A *rural telephone company* is a local exchange carrier having 100,000 or fewer access lines, including all *affiliates*.

(d) *Gross Revenues. Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, of the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For applications filed after December 31, 1994, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Businesses Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

(f) *Members of Minority Groups. Members of minority groups* includes Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(g) *Nonattributable Equity. Nonattributable equity* shall mean:

(i) For corporations, voting stock or non-voting stock that includes no more than 25 percent of the total voting equity, including the right to vote such stock through a voting trust or other arrangement;

(ii) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(h) *Affiliate.*

(1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant or of a person

holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity:

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.*

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (h)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example for paragraph (h)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1. Two shareholders in Corporation Y each have attributable interests in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a SMR application. Another shareholder in Corporation Y, shareholder B, has a

nonattributable interest in the same SMR application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the SMR application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (h)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an SMR application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (h)(5). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an SMR application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into

account in determining the size of the applicant.

Example 2 for paragraph (h)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (h)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.*

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) *Affiliation under joint venture arrangements.*

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

APPENDIX C

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this Further Notice of Proposed Rule Making. Written public comments are requested on the IRFA.

Reason for Action: This rule making proceeding was initiated to secure comment on proposals for establishing a flexible regulatory scheme for the 900 MHz Specialized Mobile Radio (SMR) service that would promote efficient licensing and enhance the service's competitive potential in the commercial mobile radio marketplace. The proposals advanced in the Second Further Notice of Proposed Rule Making are also designed to implement Congress's goal of regulatory symmetry in the regulation of competing commercial mobile radio services as described in Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332, as amended by Title VI of the Omnibus Budget Reconciliation Act of 1993 (Budget Act). The Commission also seeks to adopt rules regarding competitive bidding in the 900 MHz SMR service based on Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which delegates authority to the Commission to use auctions to select among mutually exclusive initial applications in certain services, including 900 MHz SMR.

Objectives: The Commission proposes to adopt rules for the 900 MHz SMR service that are intended to promote the growth of incumbent 900 MHz SMR systems, and emerging MTA SMR licensees, and to enhance the ability of all SMR providers to compete in the larger commercial mobile services market. The Further Notice of Proposed Rule Making seeks to establish competitive bidding procedures and a new licensing mechanism for the 900 MHz SMR service that will expedite service to the public and promote competition in the CMRS marketplace.

Legal Basis: The proposed action is authorized under the Budget Act, Pub. L. No. 103-66, Title VI, §6002, and Sections 2(a), 3(n), 4(i), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 152(a), 153(n), 154(i), 302, 303(g), 303(r), 309(i), 309(j), 332(a), 332(c) and 332(d), as amended.

Reporting, Recordkeeping, and Other Compliance Requirements: Under the proposal contained in the Further Notice of Proposed Rule Making, SMR licensees who obtain MTA-based licenses may be required to report information regarding location of their facilities and coverage of their service areas. SMR applicants seeking treatment as "designated entities" may also be subject to reporting and recordkeeping requirements to demonstrate compliance with our competitive bidding rules.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact, and Number of Small Entities Involved: The Further Notice of Proposed Rule Making potentially affects numerous small entities already operating 900 MHz SMR systems in Designated Filing Areas that will co-exist with 900 MHz SMR MTA licensees. The competitive bidding proposals contained in the Further Notice of Proposed Rule Making also could affect small entities seeking initial licenses in the 900 MHz SMR service. The Further Notice of Proposed Rule Making proposes special provisions in the Commission's auction rules to benefit "designated entity" applicants, including small businesses. After evaluating comments filed in response to the Further Notice of Proposed Rule Making, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: This Further Notice of Proposed Rule Making solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

IRFA Comments: We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph __ of this Further Notice of Proposed Rule Making.

APPENDIX D
PETITIONERS AND COMMENTERS

COMMENTS FILED IN *NOTICE OF PROPOSED RULEMAKING*, PP DOCKET NO. 93-253, 8 FCC RCD 7635 (1993), PERTAINING TO 900 MHZ SMR

American Mobile Telecommunications Association, Inc.
Geotek Communications, Inc.
RAM Mobile Data USA Limited Partnership

REPLY COMMENTS FILED IN *NOTICE OF PROPOSED RULEMAKING*, PP DOCKET NO. 93-253, 8 FCC RCD 7635 (1993), PERTAINING TO 900 MHZ SMR

RAM Mobile Data USA Limited Partnership

PETITIONS FOR RECONSIDERATION FILED IN *THIRD REPORT AND ORDER*,GN Docket NO. 93-252, 9 FCC RCD 7988 (1994), PERTAINING TO 900 MHZ SMR

American Mobile Telecommunications Association, Inc.
Geotek Communications, Inc.
Personal Communications Industry Association
RAM Mobile Data USA Limited Partnership
Rand McNally & Company

COMMENTS/OPPOSITIONS TO PETITIONS FOR RECONSIDERATION FILED IN *THIRD REPORT AND ORDER*,GN Docket NO. 93-252, 9 FCC RCD 7988 (1994), PERTAINING TO 900 MHZ SMR

Motorola
Personal Communications Industry Association

REPLY TO COMMENTS/OPPOSITIONS TO PETITIONS FOR RECONSIDERATION FILED IN *THIRD REPORT AND ORDER*,GN Docket NO. 93-253, 9 FCC RCD 7988 (1994), PERTAINING TO 900 MHZ SMR

Personal Communications Industry Association

APPENDIX D (CONTINUED)

PETITIONS FOR RECONSIDERATION FILED IN *FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING*, PR DOCKET NO. 89-553, 8 FCC RCD 1469 (1993)

American Mobile Telecommunications Association, Inc.

EX PARTE FILINGS IN *FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING*, PR DOCKET NO. 89-553, 8 FCC RCD 1469 (1993), AND *THIRD REPORT AND ORDER*, GN Docket NO. 93-252, 9 FCC RCD 7988 (1994), PERTAINING TO 900 MHZ SMR

American Mobile Telecommunications Association, Inc.
Geotek Communications, Inc.
Personal Communications Industry Association
RAM Mobile Data USA Limited Partnership

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Title: In the Matter of Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool.

In today's decision, the Commission issues the service rules for 900 MHz specialized mobile radio (SMR) as well as a Further Notice of Proposed Rule Making (FNPRM) with respect to the auction rules. I support this long-awaited decision which will assure the further deployment of this SMR service. However, I concur with respect to the auction rules. By contemplating an auction scheme that is premised on granting a bidding credit for small businesses only, it appears that the Commission is abandoning its policy and rules which were designed to enhance ownership opportunities in other technologies for those that have historically lacked access to capital. This retreat seems to be based solely on speculation about legislative and judicial activity and in some cases, on state referendum to abolish similar policies. Regardless of my personal views about the effectiveness of these rules, I believe that the Commission should not modify its policy or its rules until such time as it is directed to do so.

In June 1994, the Commission took a monumental step to ensure the meaningful participation of small businesses, and female and minority-owned businesses in the provision of spectrum-auctionable services.[1] I believed, at that time, that the Commission had made a commitment to ensuring the diversity of new service providers allocated through the auction process by addressing the historic capital formation problems that was a part of Congress's mandate which granted the Commission auction authority.[2] While I remain committed to these objectives, I am concerned that the Commission has signaled a change in its policy by proposing a small business credit that would purportedly incorporate the majority of minority and female-owned businesses in the country. If that is the case, I am convinced that we will greatly diminish the effectiveness of our efforts to ensure diverse participation other than for those well-capitalized entities or individuals that make up a large portion of today's communications industry. In the end, I believe that this proposed

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[1] Implementation of § 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348.

[2] *See*, Section 309(j) of the Communications Act.

modification of the auction rules for the service, could result in a 900 MHz SMR service that will lack participation by diverse service providers despite the Commission's efforts to the contrary.

It is clear that the political winds have changed with respect to objectives which attempt to level the playing field for females and minorities. Moreover, the Commission has suffered set backs that have recently included the elimination of the minority tax certificate policy[3] and the court's issuance of a stay for the C and F block auctions in broadband PCS.[4] Despite these challenges, I believe the Commission must forge ahead until their efforts in this area are affirmatively impeded by legislative or judicial determination. To that end, we must not "voluntarily" retreat from our stated goal of increasing ownership opportunities for minorities and women in new services solely in anticipation of further legislative or judicial action.

Further, while the FNPRM seeks to capture minorities and women under the umbrella of a very small business definition, I am concerned that the Commission's intentions may be misguided for several reasons. First, the Commission has a. statutory obligation to ensure the participation of minorities and female-owned businesses.[5] We have determined in prior decisions that this requires that the Commission address access to capital issues for these entities I anticipate that the proposed bidding credit of 10% for small businesses in this service will only be marginally effective for the attraction of financing in a service that is allegedly not as capital intensive as PCS. Second, it is questionable whether the proposed bidding credit provides a small business with the appropriate tools to successfully bid against the larger and well-capitalized incumbents or even other potential bidders that have greater access to capital. Third, experience has demonstrated to the Commission that diverse participation in auctioned services is unrealistic unless the rules are designed to truly address capital formation issues.[6] While successful participation by entities that have historically lacked access to capital is never guaranteed, we know that failure for

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[3] Self-Employed Persons Health Care Deduction Extension Act of 1995 (H. R. 831).

[4] Telephone Electronics Corporation v. FCC, NO. 95-1015, (D.C. Cir. March 15, 1995) (order granting stay).

[5] *See*, Section 309(j) of the Communications Act.

[6] For example, in nationwide narrowband PCS, a 25 percent bidding credit did not produce successful bidders among women and minority-owned applicants. In regional narrowband PCS, four of the nine winning bidders relied on a 40 percent bidding credit and installment payments to obtain licenses. *See*, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC rcd 175 (1994) at ¶ 58.

these entities is likely without equal access to capital.

Finally, while this FNPRM does not represent a final determination, it is an unmistakable indication that the Commission is not entirely comfortable with its prior decision with regard to race and gender-based preferences. Therefore, I urge potential SMR providers, and potential participants in future auctions, to heed this signal by providing information that is not purely anecdotal, but which will allow the Commission to recognize the potential adverse impact of the proposed revisions to the auction rules. In the end, I have no doubt that a failure to meet this challenge will result in the increasingly diminished participation of businesses that have been underrepresented in the past in the newer and more expensive technologies.

FCC 95-161

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	File Nos. CUID No. MA0182
Cablevision of Boston	)	LOI 93-12
Limited Partnership	)	
	)	
Rate Complaints and	)	
Letter of Inquiry	)	

ORDER

Adopted: April 14, 1995 Released: April 24, 1995

By the Commission:

1. Pursuant to 47 C.F.R. § 1.1204(b)(7), the Cable Services Bureau staff met with Cablevision of Boston Limited Partnership to discuss the resolution of issues relating to complaints regarding the rates charged for cable programming services offerings and the captioned Letter of Inquiry. The staff of the Cable Services Bureau has received from Cablevision of Boston the attached proposal to resolve the rate complaints as well as the Order on the Letter of Inquiry. On initial review the Commision believes that the proposal is a reasonable approach to resolve these matters. The Commission directs the Cable Services Bureau to serve all complainants with this proposal to ensure that the complainants are fully apprised of this proposal and have an opportunity to provide comments. Parties wishing to comment on the proposal should do so by filing with the Secretary within thirty (30) days of the date of this Order. All such pleadings should reference the file numbers noted above. Because it would be unduly burdensome to require that each complainant be served with every comment, pursuant to our Rate Order[1] we will not require the parties to serve their comments on all parties. However, all comments will be publicly available.

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[1] See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MMDocket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993)("Rate Order") at ¶363. *See also* 47 C.F.R. § 1.1200(a).

2. Accordingly, it is ORDERED that the staff shall serve the complainants with this proposal agreement and provide thirty (30) days for comment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

TERMS OF PROPOSED RESOLUTION

I. Introduction

1. These terms constitute a resolution of all cable programming service complaints currently pending against Cablevision of Boston Limited Partnership ("Cablevision"), as well as a resolution and termination of Cablevision's Petition for Reconsideration of the December 22, 1994 Letter of Inquiry Order issued by the Commission against Cablevision.

II. Background

2. Currently, Cablevision offers three levels of service to its subscribers: a 21 channel tier of Basic service for $8.56, a 30 channel cable programming service tier known as Metro for $11.92, and a 12 channel package of a la carte services known as Family Cable[1/] for $6.65.[2/] The total rate paid by Family Cable subscribers presently is $27.13.[3/]

3. Recently, Cablevision agreed with the City of Boston ("City"), the franchising authority for Cablevision, to reduce its Basic rates by $0.42 to $8.14. Cablevision has also indicated to the Commission that it will reduce its Metro rates by $0.30 to $11.62. Further, Cablevision has agreed to provide refunds to Basic and Metro subscribers which in the aggregate will total approximately $750,000. The rate for Family Cable remains at $6.65. Thus, the agreed-upon total rate for Basic subscribers is $8.14; for Metro subscribers is $19.76; and for Family Cable subscribers is $26.41. These rates are scheduled to go into effect on May 14, 1995.

[1/] The 12 channels included in the original Family Cable package are: TNT, The Disney Channel, The Discovery Channel, A&E, Court TV, Comedy Central, Sci-Fi Channel, Cartoon Network, SportsChannel New England, Trinity Broadcasting Network, New England Cable News and ESPN2.

[2/] All Family services, with the exception of SportsChannel, presently are available to subscribers for purchase on a stand alone basis for $1.00. SportsChannel is available on a stand alone basis for $0.21.

[3/] On July 1, 1994, Cablevision made five additional channels available to Family subscribers: Bravo, TV Food Network, MTV Latino, MuchMusic and GEMS. Family Cable subscribers were offered the option of retaining the original 12 channel package introduced, or creating their own 12 channel package at the same price from among the 17 channels now made available to them. At present, roughly 8,000 of the approximately 60,000 Family Cable subscribers have exercised the option to create their own 12-channel Family Cable package.

4. On December 22, 1994, the Cable Services Bureau of the Commission issued an Order resolving a Letter of Inquiry pending against Cablevision ("LOI Order"). The LOI Order required Cablevision to dismantle its Family Cable a la carte package, and repackage the offering as a regulated services tier, and subjected the company to potential refund liability.

5. On January 23, 1995, Cablevision submitted a Petition for Reconsideration of the LOI Order, in which it argued, among other things, that the 12 channel Family Cable package is a legitimate a la carte offering.

6. Thereafter, the staff met with Cablevision to discuss resolution of issues relating to the rate complaints and the LOI Order. Cablevision represented to the Commission that its initial decision to use the Commission's benchmark formula (as opposed to a cost of service filing) to establish its current rates was premised upon its good-faith assumption that its Family Cable package was a lawful a la carte offering. However, in light of the Bureau's decision in the LOI Order that the Family Cable package should be treated as a regulated tier, Cablevision represented that application of the benchmark formula prevents Cablevision from charging rates that would enable it to recover its costs. As part of this process, Cablevision submitted to the staff of the Cable Services Bureau a cost-of-service showing which justify both Cablevision's present rates and agreed-upon rates for both the Metro and Family Cable offerings. In connection with this proposal Cablevision formally will file the cost of service showing with the Commission.

III. Definitions

7. As used herein the following definitions apply:

(a) "Present Rates" means the rates currently charged by Cablevision, described in paragraph 2 herein;

(b) "Agreed-Upon Rates" means the total rates Cablevision will be charging Basic, Metro, and Family Cable subscribers (exclusive of any charge for equipment, per-program or per-channel services, MPTs, NPTs, or premium packages) beginning on May 14, 1995, as described in paragraph 3;

(c) "Cost of Service Filing" or "Filing" means the Cablevision cost of service filing dated March 30, 1995, submitted to the Commission on March 31, 1995.

(d) "Family Cable" means the 12-channel package of programming services described in footnote 1 herein;

(e) "Five New Channels" means the five additional channels made available to Family Cable subscribers in July 1994, described in footnote 3 herein;

(f) "Any 12 Family Cable Package" means a package of 12 channels, consisting of 11 or fewer of the programming services offered on Family Cable and one or more of the Five New Channels, that was custom-designed by a subscriber prior to the date the Commission approves the Agreement;

(g) "Going-Forward rules" means the Commission's rules and policies adopted in the Sixth Order on Reconsideration, 10 FCC Rcd 1226, 76 R.R.2d 859 (1994), including all subsequent clarifications and amendments;

(h) "Migrated Product Tier" or "MPT" means a tier consisting of the Five New Channels and to which other services may be added as described below in paragraph 14.d;

(i) "New Product Tier" or "NPT" means a new product tier offered and treated in accordance with Section 76.987 of the Commission's Rules;

(j) "LOI Proceeding" means the proceeding initiated by the Letter of Inquiry, dated November 17, 1993, File No. LOI-93-12.

IV. Terms

8. Cablevision accepts the jurisdiction of the Commission over it and the subject matter of these rate resolutions for purposes of the Order approving these terms.

9. All cable programming service rate cases against Cablevision currently pending before the Commission are finally resolved under the terms provided herein.

10. The LOI Proceeding currently pending before the Commission is terminated under the terms provided herein. In addition, Cablevision agrees to withdraw the Petition for Reconsideration of the LOI Order filed by Cablevision on January 23, 1995.

11. Cablevision waives any rights it may have to judicial review, appeal, and rights otherwise to challenge or to contest the validity of any order adopting these terms or to use these terms as evidence in any such proceeding. Cablevision agrees that these terms shall be incorporated by reference in the order formally adopting these terms. Cablevision and the Commission agree that they will each actively defend any order adopting these terms against any appeal of, or other legal challenge, to such an order by any third party. Cablevision and the Commission each agree that they will reasonably cooperate with the other in any such defense of these terms.

12. Cablevision agrees that any violation of the Order approving these terms shall constitute a violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

13. These terms are for purposes of settlement only, and do not constitute an admission by Cablevision of any violation, or failure to conform to, any law, rule, or policy.

14. In consideration of the termination of the LOI Proceeding and the resolution of the CPS rate complaints filed and pending against Cablevision, and in order to facilitate a fair and expeditious resolution of these matters in the public interest, Cablevision will:

(a) offer the Family Cable services to subscribers as a CPS tier of service;

(b) continue to provide all Any 12 Family Cable Packages as a CPS tier of service;

(c) implement its Agreed-Upon Rates for Basic (which would continue to be regulated by the City), Metro and Family Cable (which would be regulated by the Commission) beginning on May 14, 1995. Cablevision will be permitted to charge Metro-level subscribers a total combined rate of $19.76 (Basic and Metro) and Family-level subscribers a total combined rate of $26.41 (Basic, Metro and Family) with the rate for Basic not to exceed the Agreed-Upon Rate for Basic. These rates shall remain in effect until at least January 1, 1997, subject to increases permitted under the Commission's rules for inflation, external cost increases, and channel additions;

(d) Cablevision will treat the Five New Channels as a Migrated Product Tier (MPT) until January 1, 1997. Cablevision may not require the subscription to any tier, other than Basic, as a condition for subscribing to the MPT and may not require subscription to the MPT as a condition for subscription to any other tier. Initially Cablevision will set the rate for the MPT at $2.57. There will be no limitation to the number of new services Cablevision may add to the MPT. Until January 1, 1997, Cablevision may recover rate increases based on inflation and external costs, pursuant to Commission rules in respect of the Five New Channels on the MPT. Cablevision may increase the price of the MPT to reflect new services at the rate of $0.20 per channel plus the actual license fee(s) for the added channel(s). Any additional channels added to the MPT will not limit or otherwise affect Cablevision's ability under the Going-Forward Rules to add other channels to its regulated tiers. The channels included in this Migrated Product Tier also may be offered on an a la carte basis.

(e) On or after January 1, 1997, Cablevision may convert the MPT into a New Product Tier (NPT), as defined in 47 C.F.R. §76.987, including subsequent clarifications or amendments. This NPT will be treated as all other NPTs under the Commission's rules, provided the tier is offered without a buy-through requirement of any tier, other than the Basic tier.

15. The Commission has considered and reviewed the cost data, assumptions, and attachments presented by Cablevision in its Cost of Service Filing, and the historical facts on which they are premised. Based on the foregoing, the Commission finds that the Cost of Service Filing justifies the Agreed-Upon Rates for Metro, Family Cable, and the Five New Channels subscribers. In light of this finding and representations contained herein and in order to expedite

resolution of the pending CPS complaints and Petition for Reconsideration, to ensure reasonable rates for cable programming service subscribers, to conserve Commission resources, and to avoid litigation and administrative costs, the Commission will treat the Cost of Service Filing as effective as of September 1, 1993.

16. After January 1, 1997, Cablevision will have the option to file a subsequent cost-of-service showing for its CPS rates. Consistent with these terms nothing herein affects Cablevision's rights under the Cable Act and the Commission's rules, including, without limitation, the right to add or delete channels, consistent with the Cable Act and the Commission's rules as such Act and rules may be amended from time to time.

17. Except as provided in Paragraph 18 hereof, these terms may not be terminated or modified without the mutual agreement of Cablevision and the Commission. The Commission's consent to any such modification shall be demonstrated by an order issued by the Cable Services Bureau or, at the Commission's option, by the Commission itself.

18. If the laws or regulations applicable to any services offered by Cablevision change while these terms are in effect in a manner that would have a material favorable financial impact on Cablevision, or if any such law or regulation is repealed, vacated, modified or superseded, then these terms shall be modified or terminated, as appropriate, to reflect such change, repeal, vacation, modification, or supersession. In addition to the foregoing, if Cablevision becomes subject to effective competition, these terms shall cease to be in effect. The Commission agrees to cooperate with Cablevision to make any modifications to these terms necessary under this paragraph.

19. These terms constitute the entirety of terms with respect to the subject matter herein. No representation, warranty, promise, inducement, or statement of intention has been made by Cablevision which is not embodied herein.

20. These terms shall become effective when the Commission issues an order approving these terms.

Before the
FEDERAL COMMUNICATIONS COMMISSION **FCC 95-164**
Washington, D.C. 20554

In the Matter of	)
	)
Request for Relief from the	)
Imposition of Conditions	)
filed by Telephone and Data Systems, Inc.	)

ORDER

Adopted: April 19, 1995 **Released: May 8, 1995**

By the Commission:

1. On January 27, 1995, Telephone and Data Systems, Inc. ("TDS") filed a "Request for Relief from the Imposition of Conditions" imposed on TDS and its subsidiaries in footnote 61 of the *Memorandum Opinion & Order and Hearing Designation Order* (hereinafter referred to as the "*TDS Order*").[1] In the *TDS Order*, we ordered a hearing to determine whether the United States Cellular Corporation ("USCC"), a TDS subsidiary, misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission in violation of Section 1.17 of the Commission's rules, 47 C.F.R. § 1.17.[2] We also conditioned future grants to TDS and any of its subsidiaries on the outcome of proceedings regarding the conduct of USCC.[3] Specifically, footnote 61 states:

> We note that the Bureau has been conditioning all grants to TDS, or any of its subsidiaries, of licenses for new facilities, modification of facilities, and consent to acquire licensed facilities by assignment or transfer upon to the final resolution of the issues mentioned in footnote 3. Any further grants to these entities will also be conditioned on the outcome of this proceeding.[4]

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[1] *Telephone and Data Systems, Inc.*, 9 FCC Rcd 938, 958 (1994).

[2] *Id.* at 959.

[3] *Id.* at 958, n. 61.

[4] *Id.*

2. A licensee must have certain requisite qualifications to operate a facility in the public interest pursuant to Section 309 of the Communications Act, including adequate character qualifications.[5] In *Character Qualifications*, we detailed the relevance of a character examination to the licensing process and identified the conduct which is pertinent to such a character analysis.[6] We determined that, when a corporate entity is involved in FCC-related misconduct,[7] we would consider the bearing of that misconduct on the qualifications of any other affiliated corporate entities that also hold FCC licenses.[8]

3. Here, we consider the bearing of USCC's alleged misconduct on the qualifications of TDS and its subsidiaries, all of which are corporate affiliates of USCC. With respect to TDS, we decline to remove the condition in footnote 61, because of its close relationship with USCC and its involvement in the ongoing proceeding regarding USCC's conduct. We lift the conditions with respect to existing TDS subsidiaries other than USCC and for newly-created TDS subsidiaries in which the principals of USCC are not involved, however, because they are not part of the ongoing USCC proceeding, and their relationship to USCC is remote. After examining the facts, we have determined that the USCC individuals whose conduct is at issue are not involved in the management or the day-to-day operations of other TDS subsidiaries. We have also taken into consideration the past conduct of TDS subsidiaries. In *Character Qualifications*, we stated that "the apparently proper operation of the other stations is itself evidence of the licensee's capacity to operate . . . in the public interest."[9] TDS and its subsidiaries currently hold approximately 1,300 FCC licenses.[10] TDS subsidiaries have operated their facilities in the public interest for many years, and no

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[5] Communications Act of 1934, as amended, 47 U.S.C. § 309. *See also In Re Westinghouse Broadcasting Corp., Inc.*, 75 F.C.C. 2d 736, 739 (1980); *Policy Regarding Character Qualifications In Broadcast Licensing ("Character Qualifications")*, 102 F.C.C. 2d 1179 (1986).

[6] *Character Qualifications*, 102 F.C.C. 2d at 1181. Although *Character Qualifications* applies to broadcasters, it has been used as guidance in cases involving other services. *See, e.g., MCI Telecommunications*, 3 FCC Rcd 509, 515 at n. 14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier area as well).

[7] *Id.* at 1183, n. 11 (FCC-related misconduct describes activity which violates the Communications Act or a specific Commission rule or policy).

[8] *Id.* at 1219, ¶ 79; *see also* 102 F.C.C. 2d at 1220, ¶¶ 81-82 (stating that FCC-related misconduct involving two subsidiaries is treated in the same fashion as that involving a parent-subsidiary relationship).

[9] *Id.* at 1224, ¶ 92.

[10] *See* Letter from George Wheeler to Regina M. Keeney, Chief, Wireless Telecommunications Bureau, filed by TDS (Jan. 27, 1995).

allegations of wrongdoing have been made against any of the subsidiaries that seek relief here.[11]

4. Thus, we lift the condition imposed in footnote 61 of the *TDS Order* with respect to existing TDS subsidiaries other than USCC and for newly-created TDS subsidiaries in which the principals of USCC are not involved. Until the USCC proceeding is resolved, we continue to condition any licenses, modifications, assignments, or transfers granted to USCC, USCC subsidiaries or TDS on the outcome of proceedings regarding the conduct of USCC, and USCC will not be permitted to transfer licenses to any existing or newly-created TDS subsidiary.[12] USCC may, however, transfer licenses to TDS and USCC subsidiaries, but we will continue to condition any transferred licenses on the outcome of the above-mentioned proceeding.

5. Accordingly, **IT IS ORDERED** that the Request for Relief from the Imposition of Conditions filed by TDS on January 27, 1995, **IS GRANTED IN PART**, to the extent described herein, and **DENIED** in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[11] *Id.*

[12] *See Jefferson Radio Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964) (stating generally that a licensee whose qualifications are subject to question cannot transfer its license until the questions are resolved).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	FCC 95-168
	)	
Section 208 Complaints Alleging	)	
Violations of the Commission's	)	File Nos. E-93-134 and 138
Rate of Return Prescription for	)	
the 1989-1990 Monitoring Period	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 20, 1995; Released: April 24, 1995

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order on Reconsideration, we address petitions filed by Southwestern Bell Telephone Company (SWBT)[1] and East Ascension Telephone Company (Eatel)[2] seeking reconsideration of our December 23, 1994 decision in the above-captioned proceedings.[3] In the 1989-90 ROR Order, we, inter alia, found SWBT and Eatel liable to MCI Telecommunications Corporation (MCI)[4] for damages resulting from their violations of the Commission's rate of return prescription for the 1989-90 monitoring period. For the reasons set forth below, we grant SWBT's petition in part and deny it in part. Eatel's petition is denied.

II. SWBT PETITION

A. Background

2. In the 1989-90 ROR Order, we found SWBT's rates for special interstate access service for the 1989-90 monitoring period to be unjust and unreasonable in violation of Section 201(b) of the Communications Act

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1 See "Petition for reconsideration of Southwestern Bell Telephone Company," filed January 23, 1995 (SWBT Petition).

2 See "Petition for Reconsideration," filed January 23, 1995 (Eatel Petition).

3 Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1989-90 Monitoring Period, 10 FCC Rcd ___ (1994) (FCC 94-339, released December 23, 1994) (1989-90 ROR Order).

4 MCI has opposed both petitions. See MCI's Opposition to Petition for Reconsideration of Southwestern Bell Telephone Company filed February 7, 1995 (MCI Opposition -- SWBT) and MCI's Opposition to Petition for Reconsideration of East Ascension Telephone Company, Inc. filed February 7, 1995 (MCI Opposition -- Eatel).

of 1934, as amended (Act),[5] because they produced earnings that exceeded our rate of return prescription for that period.[6] This determination was based primarily on information taken from SWBT's final rate of return monitoring report, Form 492, filed September 30, 1991, which showed that it had earned in excess of the prescribed rate of return in the special access category.[7] We declined to consider adjustments SWBT attempted to make to its Form 492 in March 1992 that would have reduced its rate of return for the special interstate access category to prescribed levels.[8] We emphasized that the final Form 492 filed on September 30, 1991 is a conclusively binding determination of a carrier's earnings for purposes of enforcing our rate of return prescription and that SWBT failed to show extraordinary circumstances warranting a waiver of the Form 492 filing deadlines.[9]

3. Based on the violations, we ordered SWBT to pay MCI $74,974 in damages, plus interest, which we determined MCI incurred as a consequence of SWBT's unreasonable special access rates.[10] This damages amount represented our calculation of the difference between the rates MCI paid for SWBT's interstate access service and the rates MCI would have paid if SWBT had earned at the prescribed level.[11] We also determined that SWBT failed to establish that it was entitled to offsets against this damages amount.[12]

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5 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with . . . communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

6 1989-90 ROR Order at ¶ 30.

7 See 47 C.F.R. § 65.600.

8 1989-90 ROR Order at ¶¶ 18-19.

9 Id. We noted that the record in the complaint proceeding showed that SWBT discovered what it described as errors in two accrual accounts before the September 30, 1991 filing deadline, but offered no explanation of why it could not have made corrections and timely reported accurate information on its Form 492. We also noted that SWBT had provided virtually no justification for the adjustments when it filed the March 1992 amendments. Id.

10 1989-90 ROR Order at Appendix C.

11 Id. at ¶ 20, Appendix C.

12 Id. at Appendix C. In calculating damages based on violations of our rate of return prescriptions, we have allowed defendant carriers to offset damages claims based on overearnings in a particular access service category by showing that the complainant benefitted from a defendant's low rates that produced underearnings in other access service categories purchased by the complainant. Id. at ¶¶ 35-41 (citations omitted). In effect, offsets represent the

B. Contentions

4. SWBT asks that we reconsider our decision to reject its adjustments to its Form 492 and, based on the amended Form 492, reverse our liability finding. According to SWBT, the Common Carrier Bureau (Bureau) permitted U S West to make adjustments to its Form 492 for the 1989-90 monitoring period nearly three years after SWBT attempted to amend its Form 492 for the same monitoring period.[13] SWBT argues that there is no justification for accepting U S West's adjustments while rejecting those requested by SWBT.

5. SWBT also contends that the Commission erroneously found that SWBT failed to provide sufficient evidence to offset MCI's damages claims. According to SWBT, its offset calculations, which it claims were based on MCI's purchases of other interstate access services during the monitoring period, could be verified by information contained in its final, unamended Form 492. SWBT claims that in previous rate of return proceedings, the Commission has accepted offset claims that were calculated and presented by SWBT in exactly the same fashion. SWBT provides in its petition more detailed calculations along with explanations of how the calculations were accomplished.[14]

6. Finally, SWBT asks that we modify our damages calculation to reflect an allegedly more precise rate of return for the access services at issue. SWBT claims that we should base the damages calculation for the special access category on a rate of return of 12.438129 percent rather than the rounded 12.44 percent reported on its Form 492. According to SWBT, it did not need to explain the origin of the 12.438129 figure because it could be easily derived from the Form 492 and it was not required to round the actual rate of return to the two decimal places shown on its Form 492. SWBT claims that using the precise rate of return figure results in a damages award of $71,477 rather than the $74,984 calculated by the Commission.[15]

7. MCI responds that SWBT does not challenge our findings in the 1989-90 ROR Order that it failed to show the extraordinary circumstances necessary to grant a waiver of the Form 492 filing deadline.[16] MCI also

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difference between the amount MCI paid for interstate access and the amount it would have paid had SWBT earned at the prescribed level in those categories in which SWBT underearned and MCI purchased service.

13 SWBT Petition at 2-3 (citing U S West Communications, Inc. Petition for Authority to Make Permanent Price Cap Index Reduction, 10 FCC Rcd 630, 632 (Com. Car. Bur. 1994) (U S West PCI Order), recon. pending).

14 Id. at 5-8. SWBT relies on pleadings it filed in File No. E-89-390 to show that it supplied similar information in previous rate of return proceedings. See SWBT Petition at Exhibit A.

15 SWBT Petition at 3-4.

16 MCI Opposition -- SWBT at 1-4.

disputes SWBT's claïm that the Bureau's action in the U S West PCI Order was inconsistent with our action in the 1989-90 ROR Order. MCI contends that the Bureau permitted late amendments to U S West's Form 492 as part of a settlement of overearnings complaints for the 1989-90 monitoring period, while SWBT sought to make untimely amendments to its Form 492 that would have allowed it to avoid liability for excessive earnings.[17] Finally, MCI argues that SWBT should not now be allowed to furnish the detailed offsets calculations that it previously failed to provide, nor effectively to amend its Form 492 by using a rate of return different from that reported on its final Form 492.[18]

8. In reply to MCI's opposition, SWBT argues that MCI does not refute SWBT's claim that it did not overearn in the 1989-90 monitoring period, that the detailed calculations contained in its petition were not required in previous rate of return proceedings in which the Commission accepted SWBT's offset claims, and that the rate of return figure it used in its damages calculations is more precise and should therefore be accepted.[19]

C. Discussion

9. We first address SWBT's offsets claims. In the 1989-90 ROR Order, we found that SWBT had failed to establish that it was entitled to offsets because it did not adequately explain how it arrived at the offsets amounts it claimed.[20] SWBT correctly points out, however, that we have previously accepted similar evidence of offsets where there has been no objection by the complainant.[21] We note that although MCI disputed that offsets should be awarded, it did not object to the accuracy of the offsets claimed by SWBT, nor did it allege that the claimed offsets were inconsistent with the way in which we have calculated offsets.[22] Therefore, we will accept SWBT's claimed offsets.

10. SWBT claims offsets totalling $8,137,390. It derived this amount by determining, based on its unamended, final Form 492, the portion of its underearnings in the switched traffic sensitive and common line access categories that is attributable to MCI based on the ratio of

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17 Id. at 4.

18 Id. at 5.

19 Reply of Southwestern Bell Telephone Company at 1-3.

20 1989-90 ROR Order at Appendix C. SWBT provided a full explanation in its petition. See SWBT Petition at 6-8.

21 See Competitive Telecommunications Association v. the Chesapeake and Potomac Telephone Companies, 8 FCC Rcd 1224 (1993); Competitive Telecommunications Association v. the Chesapeake and Potomac Telephone Companies, 8 FCC Rcd 2517 (Com. Car. Bur. 1993).

22 See MCI Opposition -- SWBT at 7 (citations omitted); 1989-90 ROR Order at ¶¶ 35-38, Appendix C.

MCI's purchases to total purchases in those categories.[23] MCI has presented no evidence to refute this offset amount, which far exceeds the damages claimed by MCI, the damages calculated by SWBT, and the damages we awarded in the 1989-90 ROR Order.[24] Thus, consistent with our previous decisions in rate of return complaint proceedings, we conclude that the net damages due to MCI from SWBT are zero. Given this determination, we need not consider further SWBT's claim that we should calculate damages based on the more precise rate of return figure or its claim that we should accept its late-filed amendments to its Form 492. These issues are moot because, as a consequence of our decision to accept SWBT's offsets claims, no damages are due.

IV. EATEL PETITION

A. Contentions

11. Eatel bases its petition solely on the assertion that the United States Court of Appeals for the District of Columbia Circuit is likely to soon reverse the Commission's orders finding liability and awarding damages for local exchange company overearnings. Eatel argues that given the likely reversal by the Court, we should, on our own motion, reverse our finding in the 1989-90 ROR Order that it is liable for damages to MCI for its violation of the rate of return prescription.[25]

12. MCI responds that "[t]here is no basis for reconsideration on the ground that the D.C. Circuit may -- at some indeterminate point in the future -- issue a decision in another proceeding that may have a bearing on EATEL's Petition."[26] MCI further responds that it would be unfair, in any event, to reconsider the 1989-90 ROR Order pending the D.C. Circuit's issuance of a decision and the potential further appeals. MCI concludes that Eatel has presented no legally sufficient basis for reconsideration.[27]

B. Discussion

13. Eatel's reconsideration request is baseless. Supposition about the outcome of an appeal provides no basis for a decision that we should reverse our finding. Further, we disagree with Eatel's presumption that the Court is likely to reverse our earlier orders. Indeed, we have argued to the Court that these orders are lawful and reasonable, and we fully expect them to be affirmed.

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23 See SWBT Petition at 7-8.

24 MCI claimed damages of $75,094; SWBT calculated damages, without admitting liability, of $71,477; and we calculated damages of $74,984. See SWBT Petition at 3-4 (citations omitted).

25 Eatel Petition at 1-4 (referring to MCI Telecommunications Corp. v. FCC, Case No. 93-1166 (D.C. Cir., filed Feb. 18, 1993)).

26 MCI Opposition -- Eatel at 3.

27 Id. at 4.

V. CONCLUSION AND ORDERING CLAUSES

14. For the reasons set forth herein, we conclude that SWBT's petition should be granted to the extent indicated, and otherwise denied. We also conclude that Eatel's petition for reconsideration is without merit and should be denied.

15. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 405(a), that the "Petition for Reconsideration of Southwestern Bell Telephone Company" filed on January 23, 1995 IS GRANTED IN PART and DENIED IN PART.

16. IT IS FURTHER ORDERED that the "Petition for Reconsideration" filed by East Ascension Telephone Company, Inc. on January 23, 1995 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: April 27, 1995 Released: May 15, 1995

Comment Date: July 14, 1995
Reply Comment Date: August 15, 1995

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph Nos.
I. INTRODUCTION	1-2
II. BACKGROUND	3-10
III. DISCUSSION	
A. Evidence on Zoning Practices Under the Current Rule	11
1. Residential Installations	12-16
2. Commercial Installations	17-25
3. New Satellite Services	26-29
4. Municipal Government Representatives	30-34
5. Effects of Commission Forbearance	35-40
B. Proposed Modification and Clarification of the Rule	41-47
1. Procedures for Commission Review	48-50
2. Revisions of the Basic Reasonableness Test	51
a. "Differentiation" and Inter-Service Competitiveness	52-54
b. Cost and Reception Issues	55-59
c. Presumptions of Unreasonableness	60-66
d. Other Revisions of the Reasonableness Test	67
3. Waivers	68
4. Petitions for Declaratory Ruling	69-71
5. Miscellaneous Matters	72-77
IV. CONCLUSION	78
V. PROCEDURAL MATTERS	79-81
VI. ORDERING CLAUSES	82-84

I. INTRODUCTION

1. In 1986, the Commission adopted a rule preempting local regulation of satellite earth stations that differentiated between satellite receive-only antennas and other types of antenna facilities unless the regulations (a) have a reasonable and clearly defined health, safety, or aesthetic objective and (b) do not put unreasonable limitations on, or prevent, reception or impose unreasonable costs on users. The rule also preempted local regulation of satellite transmitting antennas in the same manner except that health and safety regulation was not preempted.[1] Since that time, consumers, satellite system operators, local governments, and the Commission have gained significant experience working with this rule. Based in part on this experience, the Satellite Broadcasting and Communications Association ("SBCA") and Hughes Network Systems, Inc. ("Hughes") filed petitions for declaratory rulings on our satellite-antenna preemption rule. In addition, the U.S. Court of Appeals for the Second Circuit has invalidated our requirement that satellite-antenna users exhaust all other legal remedies before petitioning the Commission for a declaratory ruling. Town of Deerfield, New York v. FCC, 992 F.2d 420 (2d Cir. 1992) ("Deerfield"). In 1993, we sought comment on the SBCA and Hughes petitions, as well as the appropriate action for the Commission to take in response to the Second Circuit's decision.

2. Based on the petitions, the comments received in this proceeding, and our experience administering Commission preemption policies since 1986, we tentatively conclude that, in light of the Second Circuit's Deerfield decision, we should modify our exhaustion of remedies requirement to permit us to interpret our preemption rule prior to any judicial review. We also tentatively conclude that in order to facilitate application of the Commission's interpretations in varied factual settings, to minimize intrusion upon local prerogatives in land-use regulation, and to promote full and fair competition between satellite services and other means of communication, we must revise the preemption rule itself. Accordingly, we are denying both petitions for declaratory relief and issuing this Notice of Proposed Rulemaking, which proposes changes in section 25.104.[2] In addition, we announce our willingness to entertain petitions for declaratory relief with respect to particular zoning disputes during the pendency of this proceeding.

II. BACKGROUND

3. In our 1986 Order[3] adopting the rule (the "Preemption Order"), we emphasized the strong federal interest in facilitating the distribution of interstate satellite communications:

> [T]he broad mandate of Section 1 of the Communications Act, 47 U.S.C. § 151, to make communications services available to all people of the United States and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system establish the existence of a congressional objective in this area. More specifically, the recent amendment to the Communications Act, 47 U.S.C. § 705, creates certain rights to receive unscrambled and

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1 See 47 C.F.R. § 25.104.

2 See In re Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, 100 F.C.C.2d 846, 847 (1985) (NPRM).

3 In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986) (Report and Order).

> unmarketed satellite signals. These statutory provisions establish a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation.[4]

We explained that the federal interest was also expressed in "competitive regulatory policies which have been promulgated to provide for a variety of services . . . . It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice."[5] Although some commenters attempted to minimize the federal interest by arguing that video programming was already available by other means such as cable, we expressly rejected this reasoning and stated that users should have access to a broader range of programming choices.

4. We also recognized, however, that zoning regulations have traditionally been enacted and administered by local authorities pursuant to the states' police powers. This led us to adopt only a limited preemption of local zoning restrictions.[6] Section 25.104, as adopted, provides:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations
>
> a) have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> b) do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on users of such antennas that are excessive in light of the purchase and installation cost of the equipment.
>
> Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.[7]

5. Absent from section 25.104 is any provision for enforcement by the Commission. In our Preemption Order, we stated that we did "not intend to operate as a national zoning board." Rather, we said, "we expect that local authorities will conform their regulations to our standards and that they will make determinations which are in the best interests of their communities that reflect federal policy."[8] However, we also made clear that we would not abdicate our ultimate responsibility for protecting access to satellite communications:

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4 Preemption Order ¶ 23.

5 Id. ¶ 26.

6 See, e.g., Id. ¶¶ 27-28.

7 47 C.F.R. § 25.104.

8 Preemption Order ¶ 39.

> Satellite antenna users who are dissatisfied with the results of any local zoning decision can use the standard adopted here in pursuing any legal remedies they might have. In addition, we would entertain requests for further action if it appears that local authorities are generally failing to abide by our standards. Any party requesting Commission review of a controversy will be expected to show that other remedies have been exhausted.[9]

Since 1986, the Commission has received numerous complaints about restrictive local regulations. Pursuant to our Preemption Order, the citizens filing these complaints have been informed that they must exhaust other legal remedies before requesting Commission relief.

6. In 1991, SBCA filed the first of the two petitions for declaratory relief that are before us. SBCA, an association representing the interests of the home satellite dish industry, asserts that "it is clear that local case-by-case enforcement of the Preemption Order is not working."[10] SBCA requests a declaratory ruling "containing five key points": (1) an extension of the preemption rule to cover ordinances that effectively ban all antennas (rather than requiring discrimination against satellite facilities); (2) an exemplary list of presumptively unreasonable types of zoning regulations; (3) an announced intention by the Commission to review at least some zoning disputes directly; (4) the elimination of any requirement for an evidentiary hearing in zoning preemption cases; and (5) a timetable for expedited Commission action in zoning preemption cases.

7. We received comments in response to the SBCA petition when it was originally filed in 1991. However, we deferred action on the petition pending final disposition of In re Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 F.C.C. Rcd. 2172 (1992). In that case, we granted a petition for declaratory relief filed by Joseph Carino, requesting preemption of the antenna ordinance of Deerfield, New York. The Commission found that Mr. Carino had sufficiently exhausted other remedies,[11] that the Deerfield ordinance unreasonably restricted his right to receive satellite-delivered signals, and that the ordinance was thus preempted.[12] The Commission's order was reversed by the U.S. Court of Appeals for the Second Circuit, which held that the Commission did not have authority to review local zoning disputes after a federal court had already decided that the ordinance was not preempted.[13]

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9 Id. ¶ 40.

10 SBCA Petition for Declaratory Ruling (April 16, 1991) ("SBCA Petition"), at iv.

11 Mr. Carino filed an action in the New York state trial level court and appealed its adverse ruling to the state Appellate Division and to the Court of Appeals of the State of New York. After losing in these courts, he filed an action in the U.S. District Court which ruled he was collaterally estopped from relitigating these issues [Carino v. Town of Deerfield, 750 F. Supp. 1156 (N.D.N.Y. 1990)] and that ruling was affirmed by the Court of Appeals for the Second Circuit [Carino V. Town of Deerfiled, Doc. No. 90-9116 (2d Cir. June 21, 1991).

12 In re Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 F.C.C. Rcd. 2172 (1992).

13 Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1992). The Second Circuit did not discuss whether the same principles would apply to a state-court ruling.

8. In 1993, following our decision on the Deerfield ordinance and the Second Circuit's reversal, Hughes filed the second of the petitions for declaratory relief currently before us. Hughes is a leading provider of Very Small Aperture Terminal (or "VSAT") antenna systems. It asks the Commission to declare that any restriction on the installation of a satellite terminal two meters or less in diameter, in an area designated for commercial or industrial use, is per se discriminatory and unreasonable (and therefore preempted) under our rule. Hughes also asks the Commission to establish procedures for enforcement directly by the Commission.[14]

9. On May 18, 1993, we issued a public notice seeking comments on the Hughes petition, the SBCA petition, and the appropriate action for us to take in light of the Second Circuit's decision in Deerfield. Comments filed by industry representatives generally support clarification of or changes to the rule.[15] Some commenters urge that the Commission's preemption policies be extended to all communications facilities.[16] There is also widespread industry support for greater Commission involvement in direct review of zoning disputes. Municipal representatives uniformly oppose any greater federal preemption, but differ among themselves about the merits of direct Commission review.[17]

10. In addition, at the Commission's suggestion, industry and local government representatives met to discuss the issues involved in this proceeding. We believed discussions would be useful in allowing the parties to share concerns with each other, and we hope they will foster greater cooperation between these groups in the future. We also anticipate that the comments filed in response to this Notice will be particularly helpful as a result of these discussions.[18]

III. DISCUSSION

A. Evidence on Zoning Practices Under the Current Rule

11. The petitioners and commenters offer substantial, detailed evidence that many local zoning restrictions are creating unreasonable barriers to the growth of satellite-based services. Local

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14 Petition of Hughes Network Systems, Inc. for Declaratory Relief (April 19, 1993) ("Hughes Petition"). Neither petitioner requests preemption of deed covenants or homeowners' association rules. We do not now propose to extend our preemption rule to these types of private restrictions. However, the Commission has received many complaints that such private restrictions are unduly interfering with access to interstate satellite communications. This issue may need to be addressed at a later date.

15 In addition to formal comments, we received several letters from Hughes's customers supporting its petition and these will be included in the record as informal comments. All of these comments have been considered. A list of commenters is attached as Appendix I.

16 Comments of National Association of Broadcasters (July 12, 1993); Comments of Association for Maximum Service Television (July 12, 1993); and Comments of American Radio Relay League, Inc. (July 12, 1993).

17 Comments of the National League of Cities (July 12, 1993); Comments of the Northwest Municipal Cable Council (July 12, 1993); Reply Comments of the City of St. Louis (August 16, 1993).

18 See Letter to Chief, International Bureau from Satellite Industry Representatives, Letter, (March 17, 1995).

governments, in turn, have indicated concern that our preemption policies not unduly impact their significant interest in regulating land use in their communities. We summarize this evidence below.

1. Residential Installations

12. SBCA's petition and the many comments filed in its support are directed primarily to services that deliver video programming directly from domestic C-band[19] satellites to residential subscribers with antennas that are eight to twelve feet in diameter. While this is the most common antenna size used for direct-to-home reception of programming at this time, new technologies are being developed and implemented that will permit reception of signals in higher frequency bands using much smaller antennas. We request comment on whether technological advances have made it possible to use smaller antennas for reception of C-band signals. Apart from flat bans on satellite-antennas that are patently inconsistent with our existing rule, the comments describe several types of local regulations that effectively prohibit earth stations on particular lots for various reasons. In Deerfield, for example, the town prohibited dish antennas on lots less than one-half acre in size. Anyone living on a lot smaller than one-half acre could not obtain permission to install an antenna.[20] In other cases, approval has been made subject to neighborhood consent; a would-be antenna user whose neighbors object, for whatever reason, can be denied the right to install an antenna.[21]

13. Furthermore, because satellite antennas must have a "line of sight" to the space station that is not blocked by buildings or vegetation, even residents who are able to obtain installation permits may be faced with placement restrictions that substantially impair reception. For example, some local ordinances only allow satellite antennas to be installed in a rear yard. Others require that antennas be set back a certain distance from the property line. Because trees or other terrain factors can obstruct the line of sight to all or a substantial number of satellites from the permitted locations, these ordinances can limit or prevent reception from certain lots.[22] In some cases, zoning codes contain no procedures for obtaining variances from such provisions.[23] Even where variance procedures exist, they often result in cumbersome and expensive proceedings that burden the antenna user's access to satellite programming.[24]

14. In addition to lot-size restrictions, neighborhood consent requirements, and placement restrictions, SBCA asserts that local ordinances commonly contain height restrictions that render C-

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19 This designation refers to the 4/6 GHz frequency bands.

20 Deerfield, 992 F.2d at 423.

21 See Comments of American Satellite Television Alliance (March 14, 1991), at 15-19, (describing how one home owner in Ojai, California obtained preliminary approval from municipal authorities but was ultimately denied a permit because of neighbors' objections regarding visual impact).

22 See Van Meter v. Township of Maplewood, 696 F. Supp. 1024, 1031 (D.N.J. 1988); Alsar Technology, Inc. v. Zoning Board of Adjustment of the Town of Nutley, 563 A.2d 83, 88 (N.J. Super. L. 1989); Johnson v. Pleasanton, 781 F. Supp. 632, 638-39 (N.D. Cal. 1991).

23 E.g., Alsar Technology, 563 A.2d at 88.

24 Van Meter, 696 F. Supp. at 1032. In addition, variance decisions may be standardless, or may be based on standards that do not reflect the strong federal interest in promoting access to satellite-delivered video programming. Id., 696 F. Supp. at 1031.

band satellite antennas unusable. In most areas of the country, a C-band antenna must be eight to twelve feet in diameter to receive an adequate signal.[25] Yet according to SBCA, many jurisdictions limit antenna size to six feet.[26] Restrictions on antenna height may also restrict pole mounting,[27] which can achieve a better line of sight to the satellite.

15. Other commenters complain about excessive costs imposed by local authorities in connection with permit procedures. They state that fees for the permit itself are sometimes excessive and associated costs can be unduly burdensome, especially where ordinances require hearings, notification of neighbors, or the submission of highly detailed engineering, architectural, or landscaping plans.[28] Requirements that antennas be "screened" from view can require considerable landscaping expense. For example, one local jurisdiction attempted to impose a $12,887.27 landscaping plan on a $5,768 antenna installation. Although it was later reversed, the trial court ruled that this was not excessive because the value of the house involved was $750,000.[29] Still other jurisdictions require such extensive screening that antenna line of sight to some satellites is blocked.[30]

16. Antenna users are not the only persons affected by restrictions on residential installations. Equipment manufacturers,[31] installers of satellite systems,[32] and producers of satellite-delivered programming[33] assert that they too have suffered economic and other harm as a result of unreasonable restrictions. The record thus reflects widespread industry support for further Commission action in this area.

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25 Preemption Order at n.77; In re Amendment of C-Band Satellite Orbital Spacing Policies to Increase Satellite Video Service to the Home, 7 F.C.C. Rcd. 456 (1992) ("3° Spacing").

26 SBCA Petition at 17; Van Meter, 696 F. Supp. at 1030.

27 SBCA Petition at 20; Cawley v. City of Port Jervis, 753 F. Supp. 128, 132 (S.D.N.Y. 1990). Interestingly, other jurisdictions effectively require pole mounting by prohibiting less expensive roof mounting. See Nationwide v. Zoning Board of Adjustment, 578 A.2d 389, 392 (1990) (testimony indicated that pole mounting cost the consumer an extra $3,500 to $4,000).

28 In another example cited by commenters, an ordinance in Olympia, Washington required all earth station installations to be in the rear yard. Those who could not get reception in that location were forced to comply with a cumbersome variance procedure that required high fees, expensive plans, notification of neighbors, and a public hearing. Such burdensome procedures, according to commenters, will often discourage applicants who ultimately decide to abandon their plans to install earth stations. See Comments of ASTA (March 14, 1991), at 10-15.

29 See City of Bloomfield Hills v. Gargaro, 443 N.W.2d 495 (Mich. App. 1989) (reversing the trial court's decision). The trial court's decision, which is unreported, is described in Comments of Satellite Dealers Ass'n of Michigan (July 2, 1991), at Exhibit A.

30 SBCA Petition at 19.

31 See, e.g., Comments of General Instrument Corp. (July 12, 1991); Comments of Tandy Corp. (July 12, 1991).

32 See, e.g., Comments of Chris TV (February 28, 1992); Comments of Camco Cable Service (May 28, 1993).

33 See, e.g., Comments of Home Box Office (July 12, 1993).

2. Commercial Installations

17. Hughes, a provider of private satellite networks to business users, describes the extent to which local regulations are impeding installation of commercial antennas, particularly VSAT systems. VSATs operate in the Ku-band[34] using transmit/receive antennas ranging in size from 1.2 meters to 2.4 meters in diameter. Hughes states that VSAT networks are used by corporations in a variety of industries, including retail, petroleum, automobile, and financial services. These industries are characterized by the need for many widely dispersed stores, branches, or offices to be connected to central locations for inventory control, sales and price updates, accounting, real-time stock market quotations, teleconferencing, reservation scheduling, and other applications. Hughes asserts that many local jurisdictions continue to enforce discriminatory regulations that plainly conflict with the Commission's rules and impede interstate communications using VSAT networks.

18. Hughes says that VSAT installations are subject to many local prohibitions that do not apply to other types of antennas. For example, some jurisdictions ban all transmitting antennas, or only permit receive-only antennas.[35] These types of ordinances effect a total prohibition on VSAT installations. Hughes asserts that this discriminatory treatment of VSAT antennas is especially inappropriate because VSATs are smaller than many receive-only antennas and are customarily installed in commercial or industrial areas rather than residential areas.[36]

19. Other local restrictions criticized by Hughes are similar to those that affect residential installations. Hughes asserts that unreasonable screening requirements, for example, can cost between $2,500 and $5,000, with an average of $3,700, more than one-third the typical $10,000 cost of a VSAT installation, including the equipment.[37] Screening is sometimes required to be as high as the antenna and to be architecturally harmonious with the building (as in Boca Raton, Florida). Screening ordinances may also require approval by an "Appearance Review Commission" (as in Libertyville, Illinois) or an "Architectural Review Board" (as in Mamaroneck, New York). Hughes relates that one New Jersey city initially required that the entire roof of a building be screened with a matching parapet at a cost of $42,000.[38] Furthermore, some jurisdictions[39] require that antennas be painted a certain color to blend with the surroundings. Hughes states that because antennas are normally made of fiberglass and covered with a special coating that sheds water and improves reception, they cannot be readily repainted. This has forced Hughes to have antennas specially manufactured or recoated on site, adding from $500 to $3,000 to the cost of the installation.

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34 This designation refers to the 12/14 GHz frequency bands.

35 Hughes cites the zoning codes of Greenburgh, New York, and Plantation, Florida.

36 Hughes Petition at 9-10. Hughes cites Carol Stream, Illinois and Mamaroneck, New York as jurisdictions that do not differentiate between differently-zoned areas of their cities in their satellite-antenna ordinances.

37 Hughes Petition at 14-15.

38 Hughes Petition at 14 n.28.

39 Hughes cites the zoning codes of San Carlos, California; Radnor, Pennsylvania; Juno Beach, Florida; and Bloomingdale, Illinois.

20. Hughes also complains about high fees sometimes charged in the local approval process. Building permit fees, for example, can range from $35 to $2,500, with an average of $150. Other fees may be charged for soil tests, environmental impact reports,[40] site inspections, and copying and distribution. Some jurisdictions require that a bond be posted in connection with the permit process.[41] According to Hughes, other procedural requirements such as site surveys ($275-$375), engineering drawings ($275-$450),[42] and processing and presentation costs ($800-$1,000) further increase the total cost of installation and create needless delay.[43]

21. Hughes also notes that many jurisdictions prohibit any rooftop installation,[44] which is the quickest and least costly option for the large majority of users. Ground installation often requires a longer cable run, which can add between $600 and $1,000 to total installation costs. In addition, ground installation takes up valuable commercial real estate that could be used for other purposes, and often makes the antenna more visible to the general public than it would be on a rooftop. This makes VSATs less attractive to the customer, according to Hughes, and therefore makes satellite service less competitive.

22. Hughes asserts that some local regulatory schemes require applicants to seek variances or special use permits without providing any written standards for these authorizations.[45] According to Hughes, the difficulty lies in the treatment of an antenna installation as the exception rather than the rule. This places the burden on the antenna user to provide, for example, proof of ownership or a plot survey; or to contact all property owners within a given radius and ask if there are any objections; or to demonstrate how the special use or variance would serve the public interest. Even when a variance is ultimately granted, the "exceptional" nature of the proceeding creates unnecessary and unreasonable complexity and delay.[46]

23. Hughes argues that many of the problems it has encountered stem from the misuse by local jurisdictions of the discretion given by the Commission's rule, and from the exhaustion of remedies requirement which hinders efficient enforcement of the rule. Hughes asserts that business

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40 Carmel, California requires a $2,000 archaeological report.

41 For example, Hughes states that Northfield, New Jersey requires that $1,000 be placed in escrow to cover the city's expenses. Hughes Petition at 17, n. 33.

42 Hughes states that engineering drawings are required so frequently that Hughes must maintain arrangements with engineers licensed in all fifty states. Hughes Petition at 18.

43 In addition, some jurisdictions require numerous stamped copies of documents, thus adding to the cost. For example, White Plains, New York requires thirty-six copies of engineering drawings. Hughes Petition at 19, n. 39.

44 Hughes cites the zoning codes of Lauderhill, Florida and Voorhees, New Jersey.

45 Hughes Petition at 21.

46 Hughes states that Brookline, Massachusetts requires a "special permit" as well as an environmental impact statement, and also requires screening upon installation. Requests for "special permits" are considered in three stages: first staff review, then Planning Board design approval, then zoning approval by a Board of Appeals. Hughes estimates the extra cost of this procedure to be $5,000 per antenna, excluding screening costs. Hughes Petition at 22, n. 42.

users face particular obstacles to effective relief from vague or overly burdensome local regulations. These users must consider the economics of their situation and are reluctant to initiate litigation against a city in which they have to operate, particularly if they need other city permits. The expense of litigation to install one antenna is difficult to justify economically, according to Hughes, because it negates one of the primary benefits of VSAT technology: quick and inexpensive installation. Hughes states that the prospect of litigation is almost certain to lead to cancellation of the installation order.[47]

24. Other VSAT operators agree that local zoning restrictions have hampered their activities. GTE states that it has experienced difficulties similar to those described by Hughes and that satellite service providers have been competitively disadvantaged because of such unreasonable installation fees and delays. It submits a chart listing ordinances from all areas of the country that require board meetings or fees greater than $100 for installation approval.[48]

25. Several Hughes VSAT customers express support for Hughes's petition and indicate that they have experienced problems with local zoning. They stress the need for quick and inexpensive installation in implementing their business plans.[49]

3. New Satellite Services

26. In addition to direct-to-home C-band services and commercial VSAT services, several emerging satellite services will use much smaller antennas, primarily in residential areas. For example, Direct Broadcast Satellite ("DBS") services will deliver approximately 150 channels of video programming directly to residential customers using antennas only eighteen inches in diameter. These antennas can be installed, in some cases by the customer, on the side of a house, on a roof, or in a yard. Two competing DBS services are already in operation and other licensees hope to enter this market as soon as they can launch their satellites. Although this new service had not yet become available when either the SBCA petition or the Hughes petition was filed, two DBS service providers have expressed concern that overly restrictive zoning policies will hamper its development.[50] These services are important because they provide competition to cable television service.

27. Another video service provider, Prime Star, has begun full-scale, direct-to-home service using portions of the Ku-band allocated for fixed-satellite service.[51] Prime Star leases transponders on a satellite operated by GE Americom, from which it transmits programming to antennas less than a meter in diameter. Prime Star plans to use digital compression techniques which will enable it to offer approximately thirty channels

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47 Hughes Petition at 31.

48 Comments of GTE Spacenet Corp., attachment (July 12, 1993). See also Comments of EDS Corp., (July 12, 1993), at 3 (time and expense of obtaining local approval imposes excessive costs on the deployment and expansion of VSAT networks); Comments of Schlumberger Technology Corp. (July 12, 1993).

49 Comments of Melville Corp. (July 6, 1993); Comments of Walgreens (July 12, 1993); Comments of The TJX Companies, Inc. (July 12, 1993); Comments of Toys "R" Us (July 12, 1993); and Comments of Target Stores (July 12, 1993).

50 Reply Comments of DirecTv, Inc. (August 16, 1993); Reply Comments of United States Satellite Broadcasting Co., Inc. (August 16, 1993).

51 DBS operates in other portions of the Ku-band.

28. Finally, Hughes Communications Galaxy, Inc., the parent of DBS provider DirecTv, has filed an application proposing a Ka-band[52] satellite system that will provide a wide range of video, audio, and data services to residential and commercial customers, at low cost and high speed. The proposed system would use transmit/receive antennas as small as twenty-six inches in diameter.

29. The emergence of these new satellite services demonstrates the competitive nature of satellite services and the increasingly important role satellite technology can be expected to play in our national information infrastructure. Likewise, there appears to be a trend toward smaller antennas that are presumably less aesthetically objectionable than larger ones. However, the ordinances highlighted in the record do not generally recognize any distinction among satellite antennas based on size.

4. Views of Municipal Government Representatives

30. Three entities representing interests of local governments submitted comments in response to our public notice. The National League of Cities ("League") strongly opposes preemption of municipal zoning authority, calling such preemption a "federal intrusion."[53] The League stresses the complexity of each individual zoning decision, and asserts that the per se approach advocated by Hughes "would strike down . . . valid restrictions on satellite dishes for a small minority of those that may be unreasonable."[54] The League does not address the particular types of restrictions highlighted by commenters in the satellite industry. It suggests, however, that the interests served by local restrictions are likely to be weighty because "it is against a city's best interests to create unreasonable burdens on business and industry."[55]

31. The Northwest Municipal Cable Council ("Northwest"), which represents seven Chicago-area communities, asserts that much of the information provided by the satellite industry is exaggerated. Northwest states that satellite dishes two meters or less are already a permitted use in residential areas. It further states that while some communities require special use application for commercial areas, most do not. Permits are required to cover costs of inspections to ensure public safety, adherence to electrical codes, and proper mounting for the weight of the antenna. These procedures would be followed for the addition of any structure.[56]

32. The City of St. Louis also filed comments indicating concern about the operation of a per se preemption and stating that it is not unreasonable to request antenna screening, to hold public hearings on behalf of affected neighborhoods, to protect historic areas, or to demand fees to cover building inspections or insurance requirements to protect neighbors. The city concedes that ".0001%" of communities might ban antennas but asserts that the petitions are "a classic case of killing a gnat with a shotgun." The city is also concerned that the use of the terms "industrial or commercial" is overbroad and vague.

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52 This designation refers to the 18/30 GHz bands. See File No. 3/4-DSS-P/LA-94.

53 Comments of the National League of Cities (July 12, 1993), at 1.

54 Id.

55 Id.

56 Comments of Northwest at 2

33. In addition to these formal comments, the Commission has received several letters from local jurisdictions expressing concerns about zoning issues[57] These letters stress the local nature of land-use regulation and state that zoning decisions should be made by local and not federal authorities. Some commenting jurisdictions state that the Commission's current preemption rule is adequate to protect the interests of antenna users.

34. In order to supplement these submissions and gain more insight into localities' positions on these issues, the Commission suggested that representatives from local governments meet with satellite industry representatives to discuss and explain their concerns. Commission staff did not participate. Representatives from both sides indicated that the meetings, which took place in February and March of this year, were extremely helpful. The Commission appreciates the efforts taken to facilitate these meetings and we look forward to the particularly focused comments that should result from this exchange of ideas. We request additional comments from a wider cross-section of local governments on all of the issues discussed in this Notice.

5. Effects of Commission Forbearance

35. Both SBCA and Hughes ask the Commission to abandon its requirement that antenna users exhaust their other legal remedies before seeking Commission review. Industry commenters also support procedures for greater Commission review.[58] Commenters maintain that the exhaustion requirement has blunted the effect of our rule, unduly limiting the Commission's ability to protect the federal interest. These commenters argue that the Commission is uniquely positioned to assess the extent to which local zoning regulations encroach upon this federal interest. Accordingly, many urge the Commission to require that a claimant exhaust only nonfederal administrative remedies before requesting Commission review.[59] The increased administrative burden on the Commission would, according to this view, be justified by the need to promote access to satellite services.

36. One municipal representative supports greater Commission review. The Northwest Municipal Cable Council (representing seven Chicago-area cities and villages) states that our current exhaustion requirement is "burdensome to everyone involved and should be streamlined through the Commission."[60] Northwest suggests a less formal complaint procedure by which the complainant can request Commission review by submitting the written denial by the locality and a letter requesting relief. Under Northwest's proposal, the Commission would be required to decide within thirty days whether to review the case; only then would we ask for further information. The parties would then have thirty days to respond to any Commission requests for additional information, and the Commission would have an additional thirty days within which to issue a decision.

37. Other commenters disagree. The American Satellite Television Alliance ("ASTA") asserts that Commission enforcement would not serve the public interest if it would force consumers to

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57 See, e.g., letters from County Council of Baltimore Co., Piedmont Triad Council of Governments, and Prince Georges's County Government.

58 See, e.g., Comments of Home Box Office (July 12, 1993); Comments of Schlumberger Technology Corp. (July 12, 1993); Reply Comments of United States Satellite Broadcasting Co., Inc. (August 16, 1993); and Reply Comments of DirecTv, Inc. (August 16, 1993).

59 See, e.g., Comments of HBO, DirecTv, Northwest, and GE Americom.

60 Comments of Northwest Municipal Cable Council (July 9, 1993), at 2.

come to Washington, D.C. or hire Washington lawyers to represent them before the Commission. ASTA also contends that direct Commission review could turn the Commission into a national zoning board of appeals, diverting time and attention from our other responsibilities. ASTA believes that limited modification and clarification of the rule is more appropriate.[61]

38. The National League of Cities states that the Commission should not change its exhaustion rule in response to Deerfield, but should instead rely exclusively on the courts to protect the federal interest from nonfederal encroachment.[62] The City of St. Louis states that adequate procedures exist on the local level.[63] In a letter reflecting continuing discussions among the interested parties, satellite representatives indicated that after their meetings with local government representatives, the latter group acknowledged the necessity for review procedures.[64]

39. SBCA and Hughes both request specific procedures to remedy the problems they perceive with the current policy. SBCA requests, among other things, that the Commission (a) institute a rulemaking proceeding to amend sections 1.91 and 1.92 of the Commission's rules to eliminate trial-type evidentiary hearings in cease and desist proceedings involving the preemption rule; (b) expedite review of preemption cases by imposing a relatively short deadlines on virtually each intermediate step in the highly structured process; (c) require all trial-type hearings to be conducted in Washington on an expedited basis; (d) prohibit time extensions; and (e) clearly place the burden of proof in a show-cause hearing on the local authority.

40. Hughes suggests a similarly detailed approach. Hughes proposes that the Commission receive and act on petitions that implicate the preemption rule, which petitions are to be no more then ten pages and must show service upon the local jurisdiction along with a statement of Commission procedures. The local jurisdiction would have fifteen days to respond to the petition and to certify that it is familiar with Commission rules. If the local jurisdiction did not respond within fifteen days, the Commission would issue a "summary form" declaring the ordinance preempted. If the jurisdiction filed a statement materially disputing the allegations, the petitioner could request that the Commission resolve the dispute by conference. Otherwise, the local jurisdiction would have ten days in which to answer the petition and the Commission would have ninety days in which to announce a decision.

B. Proposed Modification and Clarification of the Rule

41. In resolving the issues before us, we are faced with a conflict between two very important principles of government. On the one hand, we are responsible for promoting the federal interest in nationwide communications systems,[65] including access to satellite-delivered communications where appropriate.[66] In pursuit of this federal interest, we have stated many times the

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61 Comments of American Satellite Television Alliance (July 12, 1991). See also Comments of Michael Couzens (July 12, 1991).

62 Comments of the National League of Cities (July 12, 1993), at 2.

63 Comments of City of St. Louis (August 13, 1993).

64 Letter at 2.

65 See 47 U.S.C. § 151.

66 See 47 U.S.C. § 705.

strong federal interest in ensuring that users have reasonable access to satellite signals. Such is our mandate from Congress, and when nonfederal regulation "stands as an obstacle to the accomplishment of a congressional purpose," such regulation is subject to preemption.[67] On the other hand, we must, to the maximum extent possible, respect principles of federalism. Those principles are particularly weighty in this case because the nonfederal regulations in question are not overt attempts to assert control over interstate communications; they are local land-use restrictions that lie at the core of state and local police powers.

42. We cannot ignore our responsibility to protect and promote the strong federal interest in widespread access to satellite communications. Our existing preemption rule is directed toward protecting this interest. The Second Circuit's decision in Deerfield makes it clear that the Commission will have little or no opportunity to interpret and enforce this existing rule unless our exhaustion requirement is modified, and we therefore propose to do so. However, the one point on which virtually all commenters agree is that the Commission cannot and should not become a national board of zoning appeals -- a position with which we strongly concur. If the Commission is to interpret and enforce its preemption rule in specific zoning disputes, it is absolutely essential that the rule be drafted in such a way that an interpretation in one case can set useful precedent for later cases. Case-by-case determinations of reasonableness, with each case dependent almost entirely upon its own facts, will be unmanageable for the Commission. Nor can we imagine a more intrusive form of preemption, since overly fact-specific rulings would leave local governments with little ability to discharge their obligation to comply with federal law in the first instance.

43. In addition, the evidence compiled in this record indicates that local zoning restrictions have inhibited access to satellite services for a substantial number of users, widely dispersed throughout the country. The obstacles faced by these users appear to have hampered the development of existing satellite services and impeded the growth of related industries such as programming and antenna manufacturing. Moreover, the record suggests that local restrictions currently in force are likely to have a similar effect on new satellite services as they are developed. We see no evidence that the petitioners and commenters have exaggerated the extent of the difficulties. It appears that adjustments to our preemption rule are necessary to minimize the inhibitory effect of state and local zoning regulations and to advance the important federal interest in the widest practicable access to satellite signals.

44. Accordingly, after considering the strong interests on both sides of this issue, we propose to modify the preemption rule in the following ways. First, we propose procedures by which the Commission will review zoning disputes after exhaustion of only the local administrative remedies, not "all legal remedies." Second, we propose substantial revisions in our basic preemption standard, designed to provide greater certainty without abandoning the fundamental test of reasonableness. Third, we propose an explicit procedure by which cities can request waivers of the entire preemption rule. We also announce our willingness to entertain, on an interim basis, petitions for declaratory relief in particular cases under our existing rule.

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[67] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (quoting Hines v. Davidowitz, 312 U.S. 52 (1941)). See also Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461 (1984); Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); In re Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986) at ¶ 23.

45. In formulating our proposals, we have attempted to address the problems we perceive in the least restrictive or intrusive way possible. The changes we propose are intended to modify our preemption rule in such a way as to minimize costs on local governments and on antenna users and to accommodate the legitimate interests of both. By providing greater certainty in our reasonableness test, we hope that localities will be better able to enact and enforce zoning policies that accommodate federal interests while preserving local autonomy. Our goals are to promote healthy competition and to facilitate access to satellite-delivered services. We request comment, particularly from local governments, on whether there are any less restrictive alternative solutions that would accomplish these goals.

46. To codify these proposed changes, we propose to modify section 25.104 to read as follows:

(a) Any state or local land-use, building, or similar regulation that substantially limits reception by receive-only antennas, or imposes substantial costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to:

(1) a clearly defined and expressly stated health, safety, or aesthetic objective; and

(2) the federal interest in fair and effective competition among competing communications service providers.

(b) Any regulation covered by paragraph (a) of this section shall be presumed unreasonable if it affects the installation, maintenance, or use of:

(1) a satellite receive-only antenna that is two meters or less in diameter, in any area where commercial or industrial uses are generally permitted by local land-use regulation; or

(2) a satellite receive-only antenna that is one meter or less in diameter in any area.

(c) Any presumption arising from paragraph (b) of this section may be rebutted upon a showing that the regulation in question

(1) is necessary to accomplish a clearly defined and expressly stated health or safety objective;

(2) is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and

(3) is specifically applicable to antennas of the class mentioned in paragraph (b).

(d) Regulation of satellite transmitting antennas is preempted to the same extent as provided in paragraph (a) of this rule, except that state and local health and safety regulations relating to radio frequency radiation of transmitting antennas are not preempted by this rule.

(e) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal has been exhausted;

(2) the petitioner's application for a permit or other authorization required by the state or local authority has been pending with that authority for ninety days;

(3) the petitioner has been informed that a permit or other authorization required by the state or local authority will be conditioned upon the petitioner's expenditure of an amount greater than the aggregate purchase and installation costs of the antenna; or

(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(f) Any state or local authority that wishes to maintain and enforce regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create a necessity for regulation inconsistent with this section. All waiver applications shall include the particular regulation for which waiver is sought. Waivers granted according to this rule shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

We believe this expanded preemption of unreasonable local regulations is necessary to promote greater access to satellite-based communications technologies nationwide, on terms of full and fair competition with other communications services, while minimizing the Commission's involvement in local affairs. In addition, we believe the proposed changes in Commission policy will promote the growth of the satellite industry.

47. In proposing to modify section 25.104, we stress our desire to receive comments from representatives of all the affected parties -- users, service providers, equipment manufacturers and installers, and municipal governments -- in order to create a record that is as complete as possible. We also request comments on the likely practical effects of the proposed rule changes. We now turn to an explanation of the specific changes we are proposing.

1. Procedures for Commission Review

48. When we adopted our 1986 preemption rule, we expressed concern about the burden that individual review of cases would place on Commission resources.[68] This concern is still valid. The Commission's responsibilities have substantially increased since 1986 given the advent of new technologies and regulatory responsibilities. Nonetheless, the Deerfield decision leads us to revisit our 1986 exhaustion requirement. Under Deerfield we must intervene before a federal court (and perhaps a state court) has ruled, or not intervene at all. We believe the latter option would be inconsistent with our broad statutory responsibility "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with

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[68] Preemption Order, ¶ 40.

adequate facilities at reasonable charges."[69] In addition, we are concerned that the potential expense of our 1986 exhaustion requirement may have had a "chilling effect" on private vindication of the rights of both residential and commercial antenna users. Based on these considerations, we tentatively conclude that users should have the option of seeking Commission involvement.

49. The procedures we propose are intended to provide a forum for relatively prompt and relatively inexpensive resolution of satellite-antenna zoning disputes, keeping in mind the danger of overloading the Commission's staff and resources. Under our proposed rule, we would continue to require exhaustion of nonfederal administrative remedies, and we hope that our proposed rule (and the rulings in which we shall interpret it) will be sufficient to resolve the vast majority of zoning disputes at the local level. The requisite exhaustion is defined, however, in such a way that property owners will not be trapped in endless rounds of hearings and applications at the local level, effectively depriving them of speedy federal review. Although our proposed rule states that local remedies will be deemed exhausted if a petitioner's application has been pending for ninety days, we specifically seek comment on whether this time period is appropriate, given the nature of local zoning administration. A different period may more accurately reflect the amount of time required for local review of zoning applications.

50. The potential burden on Commission resources, together with some uncertainty about the volume of complaints that can be expected, lead us tentatively to reject the elaborate administrative review procedures suggested by the petitioners and some commenters. Instead, we propose a very simple procedure, set forth in subparagraph (e) of the proposed rule, that gives antenna users and municipalities every opportunity to be heard. The Commission will then act promptly and with enough clarity to minimize the need for Commission review of other cases as time goes on. We seek comments on the anticipated operation of this approach.

2. Revision of the Reasonableness Test

51. Paragraph (a) of our proposed rule states a test of reasonableness for all receive-only satellite antennas. Although we have retained the reasonableness approach rather than a per se preemption, our proposed formulation of this test includes significant revisions.

a. "Differentiation" and Inter-Service Competitiveness

52. Section 25.104, as currently written, contains a threshold "differentiation" requirement that limits federal preemption to ordinances that "differentiate between satellite receive-only antennas and other types of antenna facilities."[70] When we adopted this threshold requirement, we stated:

> Non-federal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment. . . . Communities wishing to preserve their historic character may limit the construction of "modern accoutrements" provided that such limitations affect all fixed external antennas in the same manner. In adopting this rule we intend that it

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[69] 47 U.S.C. § 151.

[70] 47 C.F.R. § 25.104.

> be a valid accommodation of local interests as well as of two federal interests, namely promoting interstate communications and historic preservation. Communities which are truly concerned with preserving their unique historic character may do so if they do not discriminate against satellite receive-only antennas.[71]

53. As pointed out by several commenters, this threshold differentiation requirement appears to have caused unintended results.[72] In Deerfield, for example, the state court upheld a complete prohibition on satellite dishes for lots smaller than one-half acre, on the ground that the prohibition also applied to one other type of antenna.[73] The differentiation requirement also tends to obscure the full scope of the federal interest in this area. While we were rightly concerned in our Preemption Order with equal treatment for competing modes of communication, the current threshold differentiation requirement implicitly suggests that the federal interest begins and ends with equal treatment. This is not the case.

54. We therefore propose to remove the threshold differentiation requirement from section 25.104. We believe the concerns about local character and historical preservation that we expressed in our Preemption Order can be better accommodated by the proposed waiver provision we discuss below. We continue to be very concerned about equal treatment for competing communications technologies, but we believe we can better advance this competitive concern by adding subparagraph (a)(2), which explicitly and more narrowly focuses on competitiveness across technologies.

b. Cost and Reception Issues

55. We also propose to clarify the way our rule deals with ordinances and conditions that increase cost to the user or diminish reception. The current rule, for example, preempts any ordinance that "impose[s] costs on users . . . that are excessive in light of the purchase and installation cost of the equipment." In our discussions with representatives of local government, some have argued that if this approach is used, falling equipment costs threaten to rule out even those regulatory conditions that are absolutely necessary to ensure that antennas are safely installed. We can also take notice of the fact that at least one service provider, Prime Star, is beginning to offer direct-to-home video on a subscription basis without requiring subscribers to buy any equipment at all, a situation that seems not to have been contemplated by the existing rule.

56. Similarly, the current rule provides that an ordinance will be preempted if it "unreasonably limit[s] reception by receive-only antennas." American Satellite Television Alliance urges us to replace this "unreasonable limitation" standard with a rule preempting any regulation that "operate[s] to prevent reception of satellite delivered signals by receive-only antennas."[74] ASTA argues that the "unreasonable limitation" standard necessarily requires decisionmakers (courts or the Commission) to make judgments about content as a means of determining, for example, whether it is

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71 Preemption Order, ¶ 32.

72 See Petition at 26, Comments of ASTA.

73 See Deerfield, 992 F.2d at 425.

74 Comments of ASTA (July 12, 1993), at 18.

reasonable to impose a physical screening requirement that prevents reception of one satellite channel, e.g. HBO, as long as the antenna-user can receive another channel, e.g. the Disney Channel.

57. In addition, we note that the existing rule appears to require three separate determinations of "reasonableness": one about the stated local objective; another about the extent of any limitation on reception; and yet another about any costs imposed on users. While any application of our rule must be sensitive to a wide variety of competing concerns, the analytical complexity of the current formulation seems to obscure the central point, which is that any significant burden on a citizen's access to satellite communications must be justified by a local policy that can overcome the federal interests in access and competition.

58. We therefore propose to reformulate the reasonableness test to eliminate any "balancing" as to issues of cost and reception. Under our proposed paragraph (a), the reasonableness test only applies to ordinances that substantially limit reception, or impose substantial costs on users. This is more than a semantic change. In this context at least, "substantial" is by no means equivalent to "enough to be unreasonable." Instead, it is a rather low threshold, indicating only that a federal interest has been burdened in a way that is not insignificant, and which therefore calls for justification.

59. We believe this reformulation would also ameliorate ASTA's constitutional concerns about content-based regulation, by treating the amount of satellite programming one receives as a threshold issue and keeping the real focus on the reasonableness of the balance struck between the competing local and federal interests. We welcome comments on whether some other formulation of the test in section 25.104(c) would provide greater guidance without imposing excessive rigidity.

c. Presumptions of Unreasonableness

60. Two DBS providers urge us to preempt per se all local regulation of receive-only[75] antennas one meter or less in diameter.[76] Similarly, Hughes suggests that we preempt per se all local regulation of antennas up to two meters in diameter in commercial or industrial areas. We do not propose to adopt either of these per se preemptions at this time.

61. There are two basic arguments in favor of a per se approach to smaller antennas. First, the interests of municipalities in regulating such antennas should be diminished, since these antennas do not appear to raise the aesthetic concerns that have prompted many communities to restrict installation of larger antennas. Second, most of these antennas can be installed quickly and inexpensively -- some by the consumer without assistance -- making any permit process particularly burdensome and unnecessary in relation to other equipment and installation costs.

62. In addition, a standard based on underlying land-use designations gives appropriate weight to local autonomy by allowing local authorities greater latitude to restrict satellite installations

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[75] Satellite transmitting antennas would receive the same degree of federal protection, except that health and safety regulations related to radio frequency radiation would not be preempted. See proposed section 25.104(d).

[76] DirecTv and USSB proposed preempting all regulation of antennas twenty-four inches or smaller. We are proposing to preempt regulation of antennas one meter or smaller to include not only DBS antennas, but the antennas of similar services. Although they are somewhat larger than DBS antennas at this time, we believe these other antennas are sufficiently similar to DBS antennas in that they will usually have little or no visual impact.

in areas that are otherwise highly restricted (e.g., residential areas), but less latitude in areas that are otherwise less restricted (namely, areas in which commercial or industrial activity is permitted). Thus, the per se preemption advocated by Hughes would be limited to areas in which the community has already exercised its police powers and has expressly decided to tolerate the negative visual impact that normally comes with commercial or industrial activity. When mounted on the ground, a two-meter antenna will be no more unsightly than many dumpsters or signs found in such areas. When roof-mounted, antennas of this size will be unseen by most people, and should in any event create no more visual blight than a common commercial rooftop air conditioner.

63. However, local government representatives strenuously object to any type of per se preemption. They point out that aesthetic equivalence between small satellite dishes and other structures does not mean that there are no non-aesthetic reasons, such as health and safety, for treating satellite antennas differently. They argue that a per se approach to preemption would eliminate any opportunity for consideration of these local justifications, amounting to a federal usurpation of their prerogative to balance the competing interests in the first instance. In addition, local authorities contend that the record does not contain sufficient evidence of actual interference with the installation, use, or maintenance of VSAT or DBS antennas.

64. We decline to propose a per se approach at this time. Instead, we propose a presumption of unreasonableness for the situations cited by the DBS and VSAT industries. Under our proposed paragraph (b), any ordinance that substantially increases the cost or substantially limits the reception of an antenna smaller than one meter would be subject to the basic reasonableness test, but would be presumed unreasonable. The same would be true of any ordinance that substantially increases the cost or substantially limits the reception of an antenna smaller than two meters in a commercial or industrial area. Both of the presumptions we propose would be rebuttable upon a showing by the local authority that the restriction in question is (1) necessary to accomplish a local health or safety objective; (2) no more burdensome than necessary to achieve that objective; and (3) specifically applicable to the class of antennas subject to the presumption. The first two of these "rebuttal criteria" guarantee that important local interests in health and safety can be accommodated despite the diminished aesthetic impact of smaller dishes. The third rebuttal criterion recognizes that many local ordinances do not yet distinguish among types or sizes of satellite antennas, and that a local judgment that does recognize a possible distinction but expressly balances the competing policies for the precise type of antenna in question is entitled to greater federal deference than a sweeping restriction on a larger class of antennas.

65. We tentatively prefer the approach proposed here to a per se approach for two primary reasons. First, the use of rebuttable presumptions affords local authorities an opportunity to articulate the policies they are pursuing, while a per se approach essentially assumes that these local interests are of no more than secondary importance. Even though we are proposing a "waiver" provision that could permit local government to vindicate their regulations even under a per se approach, the waiver provision would require an application from the local authority, citing "local concerns of a highly specialized or unusual nature." By contrast, the presumptions we propose could be rebutted in the context of any particular case. Second, the presumption approach is a more incremental solution to the problems cited in the record. The importance and centrality of the local interests that would be subordinated by a per se approach lead us to embrace this more moderate alternative at this time, even though we thereby risk the possibility that further Commission action will be required in the future.

66. In making this proposal, we recognize that no DBS satellites had been launched and no service was being provided when the Commission issued its public notice calling for comments on the Hughes and SBCA petitions. Thus, the record does not contain evidence of specific cases in

which zoning regulations have impeded the installation of these smaller antennas. However, the record does indicate that many of the ordinances restricting residential installation would, on their face, apply to DBS antennas.[77] We are concerned that as DBS service and other direct-to-home video services begin to expand, local zoning regulations may inhibit access in a way similar to that described in this record for C-band antennas. We ask for specific comments on whether this concern is valid. We also seek comment, particularly from local governments, about whether the presumption for "areas where commercial or industrial uses are generally permitted" is framed narrowly enough to accommodate "spot zoning" for isolated commercial uses in otherwise residential areas.

d. Other Revisions of the Reasonableness Test

67. In addition to the changes proposed above, we propose two more modest revisions to the reasonableness test. First, the proposed rule states explicitly that the burden of demonstrating that a regulation complies with section 25.104 is on the governmental entity that promulgates the regulation. We believe this allocation of the burden is required where a federally sanctioned interest in receiving satellite communications has been burdened in some substantial way. Second, the proposed rule now includes a requirement that any nonfederal objective offered to save a regulation from preemption must be expressly stated in the regulation itself. One court has interpreted the existing rule as requiring such an express statement,[78] and we believe it will facilitate a more sensitive review of local ordinances by the Commission. Third, paragraph (a) now refers expressly to the federal interest in ensuring that nonfederal regulations do not adversely affect efficient competition among alternative communications technologies by creating unwarranted constraints on user preference. We seek comment on the anticipated effects of these proposed revisions.

3. Waivers

68. Subparagraph (f) of our proposed rule provides, for the first time, an explicit means by which communities can ask the Commission to waive section 25.104 entirely or in part, in recognition of local interests.[79] We believe such waivers must be available in order to prevent our proposed rules from intruding on local autonomy any more than is necessary to protect the federal interest. We expect the waiver process to promote both federal and nonfederal interests, by allowing us to accommodate compelling local interests, for example, those related to historic districts, where they arise without in any way relaxing the rules that must apply in the vast majority of cases.

4. Petitions for Declaratory Ruling

69. Both petitioners request declaratory orders and assert that a rulemaking is not necessary. However, the language of the current rule simply will not bear the per se "interpretations"

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[77] For example, the ordinance at issue in Deerfield prohibited the installation of any "dish" antenna on a lot less than one-half acre in size. Similarly, other ordinances cited by commenters require neighborhood consent, screening, permit fees, or engineering drawings for all dish antennas, regardless of size. In addition, some ordinances requiring set-backs or prohibiting roof mounting do not take into account the size of the dish.

[78] Cawley v. City of Port Jervis, 753 F. Supp. at 132. See also Hunter v. City of Whittier, 257 Cal. Rptr. 559 (Cal. App. 1989).

[79] Previously, any request for a waiver of our preemption rule could only have been made under our general waiver provision, 47 C.F.R. § 1.3.

both petitioners request. The primary obstacle is the threshold "differentiation requirement" in the current rule, which only permits preemption of ordinances that treat satellite antennas differently from other antennas. Because of this differentiation requirement, the current rule clearly would not preempt an ordinance stating, for example, that no home or place of business may affix any outdoor antenna of any kind. To "interpret" the rule otherwise would do violence to the distinction between creating and interpreting a rule.

70. In addition, even without the difficulty presented by the differentiation requirement, the current rule is clearly phrased in terms of the reasonableness of the local regulation. To interpret this rule as a per se preemption of restrictions on any particular class of antennas would suggest that local interests could never be significant enough to permit any regulation of certain antenna types. As we have indicated, this would be unduly dismissive of the strong local interest in appropriate land-use regulation. The rule change we propose, unlike an "interpretation" of the existing rule, sets forth a more nuanced approach based on rebuttable presumptions, and adds an explicit "waiver" procedure that covers unusual cases. Proceeding by rulemaking also permits us to solicit further comments from representatives of local governments, and to focus those comments on our specific proposal. Given our respect for the principles of federalism, we believe this notice and comment procedure is of great import.

71. Although we believe these considerations require a rulemaking rather than declaratory relief, we nonetheless agree with the petitioners' concerns that immediate relief should be available in particular cases. Thus, we will entertain petitions for declaratory relief under the current rule in particular cases on an interim basis, until the completion of this rulemaking.[80] Petitioners for such relief must show that they have exhausted local administrative remedies.[81] This modification of our current exhaustion requirement is necessary for the Commission to discharge its responsibilities in light of the Second Circuit's Deerfield decision.[82] This action will provide an opportunity for immediate relief to satellite-antenna users that can demonstrate that they are facing unreasonably restrictive local zoning practices.

5. Miscellaneous Matters

72. SBCA and other commenters urge us to state specifically that antenna users have a federally protected right of access to satellite-delivered programming subject to limitations imposed by federal law.[83] ASTA cites an opinion from the U.S. District Court for the Northern District of California holding the Commission's rule did not create a federal right that could be enforced by an action under 42 U.S.C. § 1983.[84] Related to this is the question of whether attorneys' fees can be

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[80] This action is consistent with our statement in the Preemption Order that the Commission would entertain requests for further action if it appeared warranted. Preemption Order at ¶ 40.

[81] See e.g., proposed § 25.104 (e).

[82] See generally Part III.B.5.

[83] SBCA Petition 10-15. See also comments of ASTA. Another 1991 commenter, Michael Couzens, quotes legislative history of section 705, 47 U.S.C. § 605, in support of his argument that Congress intended to establish a right of reception. See also reply comments of EDS Video Services at 6.

[84] Johnson v. Pleasanton, 781 F. Supp. 632 (N.D. Cal. 1991).

recovered by a victorious plaintiff under 42 U.S.C. § 1988. Some commenters assert that the ability to sue for attorneys fees is crucial to private enforcement of the Commission's preemption rule.[85]

73. We are not persuaded that it is appropriate for the Commission to say anything more than it has said in the past on this issue. We have referred many times to various federal "rights" protected under section 25.014. In the Preemption Order, we declared that, based on sections 151 and 705 of the Communications Act, there is "a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation."[86] In the Deerfield order, we reaffirmed our position that the rule is "based on the concern that excessive local regulation would unduly interfere with the federally guaranteed right of earth station antenna users to receive certain satellite signals for private home viewing."[87] In addition, we have always contemplated that our rule would enable satellite-antenna users to "use the standards adopted here in pursuing any legal remedies they might have."[88] The interpretation of §§ 1983 and 1988 is better left to the federal judiciary.

74. The National Association of Broadcasters (NAB) has requested that the Commission consider expanding the scope of its preemption to reach all communications facilities including broadcasting antennas.[89] The NAB asserts that by imposing restrictions, nonfederal authorities are, in effect, "un-licensing" FCC licensed facilities. NAB provides details of difficulties that broadcasters have encountered in building antenna facilities and expresses concern that new technologies such as Advanced Television (ATV) and terrestrial digital audio broadcasting (DAB) may be difficult to implement if providers cannot put up new antennas. The Association for Maximum Service Television, Inc. ("MSTV") expresses similar concerns and states that because of changes in the relationship between cable systems and broadcast stations resulting from the 1992 Cable Act, the Commission can no longer rely on the assumption of universal cable carriage of broadcast signals. According to MSTV, many people have removed their antennas because they subscribe to cable and if local zoning restrictions inhibit new antenna installations, homes may not be capable of receiving broadcast programming not carried by cable. The American Radio Relay League also requests that the Commission clarify its amateur radio policies.[90]

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85 See Comments of ASTA (July 9, 1993), at 15; Comments of Michael Couzens (July 12, 1991), at 4.

86 Preemption Order, ¶ 23.

87 7 FCC Rcd at 2172, ¶ 2.

88 Preemption Order, ¶ 40. Section 1983 has been used as a jurisdictional basis for lawsuits brought by earth station owners to challenge local zoning laws.

89 Comments of NAB.

90 Comments of ARRL. See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 50 Fed. Reg. 38813 (September 25, 1985) (PRB 1).

75. We decline to expand the scope of this proceeding to include preemption of local regulation of all antennas.[91] The focus of this proceeding is satellite earth stations and is based on a record detailing problems with satellite antennas. Expansion to other types of facilities would be inappropriate. However, we note this should not be construed as approval of unreasonable local regulation of non-satellite antenna facilities. The Commission is committed to assist in the expansion of telecommunications in general. Local regulation that needlessly inhibits such expansion is contrary to our goals and policies.

76. We also decline, as we did when we adopted the original satellite-antenna preemption rule, to enumerate specific types of ordinances that would violate the rule. As pointed out by ASTA, any list could not include all possible preemptable regulations and therefore could lead to circumvention of our policies.[92]

77. Finally, we call attention to two possible avenues for voluntary, cooperative approaches to the problems in this record, which satellite antenna interests and local governments can implement independently of the outcome of this proceeding. First, we support suggestions by municipal representatives that educational efforts could eliminate some problems that antenna users are experiencing with local zoning boards. While we sympathize with the difficulty of pursuing policy changes simultaneously in 10,000 different local jurisdictions, informational campaigns undertaken jointly by satellite service providers and associations representing local governments may be effective in reducing the number of zoning disputes to more manageable proportions than the record before us indicates. Second, a group called the Building Officials & Code Administrators International, Inc. (BOCA)[93] suggests that the process to change model building codes that are often adopted by local jurisdictions could be used to resolve problems with antenna regulations. BOCA proposes that its process be used as an alternative to federal preemption. Because the model code process is not mandatory and would not apply to all jurisdictions, we do not believe that it can replace our preemption policies. Nonetheless, a model code would certainly be helpful, providing more certainty for users and promoting cooperation and communication among all those involved. We welcome suggestions of other approaches which, either alone or in conjunction with our proposed rule changes, could be effective in resolving many disputes before they come to our attention.

IV. CONCLUSION

78. Based on the record compiled here, we tentatively conclude that we must modify the exhaustion requirement we included in our 1986 Preemption Order. Under the Second Circuit's Deerfield decision, our current policy would prevent us from discharging our duty to interpret and enforce our preemption rule. We further conclude tentatively that, given the change we must make to our exhaustion policy, we must modify section 25.104 of our rules to provide greater clarity for users, local governments, and all those who must construe that rule and our interpretations of it. In addition,

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91 The Commission reached the same conclusion when it denied NAB's Petition for Partial Reconsideration in 1987. The Commission is considering the matter of RF radiation hazard in the context of another proceeding, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62.

92 Comments of ASTA at n. 10.

93 Letter from Building Officials and Code Administrators International, February 21, 1995, where the organization is described as "a private, not-for-profit association of code officials, designers, manufacturers, and others interested in regulating building construction efficiently."

we hope the proposed modifications of our preemption rule will address the evidence in this record that local land-use, building, and similar regulations have impeded users' access to satellite communications and inhibited the development of satellite-based technologies. We believe that these proposals will promote greater access to these important services and will also promote economic growth and efficiency by providing for quick and cost-effective antenna installation without unreasonable local barriers. We also believe that our proposals are crafted in such as way as to minimize federal interference with local autonomy. We solicit comments from all interested parties, including service providers, equipment manufacturers, consumers, programmers, land-use managers, and other representatives of local governments. A full and complete record in this matter will ensure that our final rule takes into consideration the views of all these persons.

V. PROCEDURAL MATTERS

79. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

80. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix III. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis.

81. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before July 14, 1995 and reply comments on or before August 15, 1995. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information contact Rosalee Chiara at (202) 739-0730.

VI. ORDERING CLAUSES

82. Accordingly, IT IS ORDERED that, pursuant to sections 1, 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 303(r) NOTICE IS HEREBY GIVEN of the proposed amendments to section 25.104 of the Commission's Rules, 47 C.F.R. § 25.104, in accordance with the proposals in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals.

83. IT IS FURTHER ORDERED that the petitions for declaratory relief filed by SBCA and Hughes are DENIED.

84. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

LIST OF COMMENTERS

Comments: 1991

American Home Satellite Association
Associated Communications
Earth Terminal TV Ltd.
General Instrument Corporation
Hughes Network Systems
Michael Couzens
National Association of Broadcasters
Satellite Dealers Association of Michigan
Satellite Dealers' Coalition
Tandy Corporation
United States Satellite Broadcasting Co., Inc.
Video Services Corporation and Atlantic Satellite Communications

Reply Comments: 1991

American Satellite Television Alliance
EDS Video Services
Hughes Communications Galaxy, Inc.
Orange County Broadcasting Corporation
Tandy Corporation

Comments: July 12, 1993

Abbott, Robert J. (City of Cape Canaveral)
American Radio Relay League, Inc.
American Satellite Television Alliance
Association for Maximum Service Television
EDS Corporation
GE American Communications, Inc.
GTE Spacenet Corporation
Home Box Office
Hughes Network Systems, Inc.
Melville Corporation
National League of Cities
National Association of Broadcasters
Northwest Municipal Cable Council (on behalf of 7 cities and villages)
Satellite Broadcasting and Communications Association of America
Schlumberger Technology Corporation
Target Stores
John C. Thomas
The TJX Companies, Inc.
Toys "R" Us
W. James MacNaughton, Esq.
Walgreens

Reply Comments: August 16, 1993

Association for Maximum Service Television
City of St. Louis
DirecTv, Inc.
Home Box Office
Hughes Network Systems, Inc.
National Association of Broadcasters
Satellite Broadcasting and Communications Association of America
United States Satellite Broadcasting Company, Inc.

Motion to Accept Supplemental Reply Comments and Supplemental Reply Comments -- Hughes Network Systems, Inc. (August 31, 1993)

Letters filed in support (various dates):

Alfred Ricks, Jr.
Building Officials & Code Administrators International, Inc.
Camco Cable Service
Chris TV
Chrysler Corporation
Circuit City Stores, Inc.
City of Livonia (MI)
City of St. Louis (MO) (additional letter)
Congressman Billy Tauzin
County Council of Baltimore County (MD)
CPI Datanet
Edward D. Jones & Co.
FootAction U.S.A.
ICN/Datalinc, LTD.
Kohl's Department Stores
Melville Corporation
Midwest Star Satellite TV
Montgomery Ward & Co.
Pathmark Stores, Inc.
Piedmont Triad Council of Governments
Prince George's County Government, Office of Citizen and Consumer Affairs
Service Merchandise
ShopKo Stores, Inc.
Southern California Chapter of NATOA
Thomson Consumer Electronics
Toyota Motor Sales, U.S.A., Inc.
Wincom Systems

Other Documents:

United States Court of Appeals for the Second Circuit -- Town of Deerfield, NY v. FCC, -- Decision

For the reasons set forth in the NPRM, the Federal Communications Commission proposes to amend Title 47, Part 25 of the Code of Federal Regulations, as follows:

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: Sections 25.101 to 25.601 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-104, 76 Stat. 416-427; 47 U.S.C. 701-744; 47 U.S.C. 554.

2. Section 25.104 is revised to read as follows:

(a) Any state or local land-use, building, or similar regulation that substantially limits reception by receive-only antennas, or imposes substantial costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to:

(1) a clearly defined, and expressly stated health, safety, or aesthetic objective; and

(2) the federal interest in fair and effective competition among competing communications service providers.

(b) Any regulation covered by paragraph (a) of this section shall be presumed unreasonable if it affects the installation, maintenance, or use of:

(1) a satellite receive-only antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by local land-use regulation: or

(2) a satellite receive-only antenna that is one meter or less in diameter in any area.

(c) Any presumption arising from paragraph (b) of this section may be rebutted upon a showing that the regulation in question

(1) is necessary to accomplish a clearly defined and expressly stated health or safety objective;

(2) is no more burdensome to satellite users that is necessary to achieve the health or safety objective;

(3) is specifically applicable to antennas of the class mentioned in paragraph (b).

(d) Regulation of satellite transmitting antennas is preempted to the same extent as provided in paragraph (a) of this rule, except that state and local health and safety regulations relating to radio frequency radiation of transmitting antennas are not preempted by this rule.

(e) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal has been exhausted;

(2) the petitioner's application for a permit or other authorization required by the state or local authority has been pending with that authority for ninety days;

(3) the petitioner has been informed that a permit or other authorization required by the state or local authority will be conditioned upon the petitioner's expenditure of an amount greater than the aggregate purchase and installation costs of the antenna; or

(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(f) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create an overwhelming necessity for regulation inconsistent with this section. No application for waiver shall be considered unless it includes the particular regulation for which waiver is sought. Waivers granted according to this rule shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

APPENDIX III

Initial Regulatory Flexibility Analysis

Reason for Action

The rulemaking is initiated to obtain comment on the proposed changes to the Commission's zoning preemption rule, 47 CFR §25.104.

Objectives

The Commission seeks to evaluate whether the proposed changes to the satellite antenna zoning preemption rule will facilitate the installation of antennas and assist in the development of satellite based technologies.

Legal Basis

The proposed action is authorized under Sections 4(i) and 303 (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 303 (r).

Reporting, Recordkeeping, and Other Compliance Requirements

Satellite antenna users who have exhausted local administrative remedies may bring complaints to the Commission regarding overly restrictive zoning ordinances and local governments can petition the Commission for waiver of the rule.

Federal rules that Overlap, Duplicate or Conflict With These Requirements

None

Description, Potential Impact and Number of Small Entities Involved

Any policies or regulations adopted in this proceeding could affect small businesses that install or use satellite antennas. In addition, small governmental entities will be affected by any rule changes and may have to reevaluate their satellite antenna zoning policies.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives

This Notice solicits comments on any suggested alternatives.

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 95-189

In the Matter of	)	
	)	
Amendment of Part 36 of The	)	CC Docket No. 80-286
Commission's Rules and	)	
Establishment of a Joint Board	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: May 4, 1995; Released: May 15, 1995.

By the Commission:

Comment Date: July 15, 1995; Reply Comment Date: August 14, 1995.

I. INTRODUCTION

1. This Notice of Proposed Rulemaking (Notice) proposes to change the rules applicable to local exchange carriers (LECs) for allocating the Other Billing and Collecting (OB&C) expenses[1] portion of Account 32.6623, Customer services, between the state and interstate jurisdictions.[2] It proposes to establish permanent separations procedures to replace the interim procedures currently used to allocate OB&C expenses and to prescribe alternative allocation procedures that would be used in the event that an interexchange carrier (IXC) takes back substantial billing and collecting functions from LECs.[3]

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[1] Throughout this Notice, the phrase "OB&C expenses" refer to the Other Billing and Collecting Expenses described in 47 C.F.R. §36.380 (1994).

[2] 47 C.F.R. §§32.6623, 36.380 (1994).

[3] The antecedents of this Notice are described more extensively in the Commission Order denying the petition for declaratory ruling of the National Exchange Carrier Association, Inc. (NECA) on the treatment of expenses associated with billing the subscriber line charge (SLC), and in the prior Commission Order adopting the interim allocation procedures. See National Exchange Carrier Association, Inc., 7 FCC Rcd 8554 (1992) *(SLC Billing Expense Order), petitions for recon. pending*; Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, 3 FCC Rcd 5518 (1988) *(Reconsideration Order)*. See also n.7, infra, for a definition of the term, "subscriber line charge."

2. We propose to prescribe a fixed factor allocation approach (i.e., an approach under which a specified percentage of the costs would be allocated to the interstate jurisdiction) for OB&C costs, and invite comment on four possible fixed factor methodologies. In addition, we ask parties to suggest alternatives to these proposed approaches. We also invite comment on the need for a contingency provision that would be triggered by one or more of the IXCs' substantially reducing their use of LEC billing and collecting services. At this time, we refer the several issues involving OB&C separations procedures to the Docket 80-286 Joint Board for a recommendation.

II. BACKGROUND

3. OB&C expenses are the costs incurred by LECs in preparing and rendering customer bills (other than carrier access charge bills), and in accounting for revenues generated by those bills. Because the Commission detariffed interstate billing and collecting services in 1986,[4] most of the expenses allocated to the interstate jurisdiction are not recoverable through interstate access charges. Instead, most interstate billing and collecting costs are allocated to nonregulated activities, and are recoverable through untariffed charges for non-regulated services. The sole exception is the billing and collecting cost for the federal end user common line charge[5] which, pursuant to Section 69.407(a) of our rules,[6] is recovered through the common line access rate element.[7]

4. Prior to 1987, the rules for jurisdictional separation of OB&C expenses required that LECs attempt to determine the amount of time spent billing for services on a jurisdictional basis. The complexity of that methodology and the administrative burdens of applying it led to its replacement with a new approach, which was expected to simplify the separation of OB&C expenses. In 1987, the Joint Board recommended, and the Commission adopted, an interstate apportionment formula that was based on the number of users billed by each LEC for specific interstate and intrastate services.[8] This formula established upper and lower bounds of thirty-

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[4] See Detariffing of Billing and Collection Services, 102 FCC 2d 1150, recon. denied, 1 FCC Rcd 445 (1986).

[5] 47 C.F.R. §69.104 (1994).

[6] 47 C.F.R. §69.407(a) (1994).

[7] The federal end user common line charge, sometimes referred to as the "subscriber line charge" (or "SLC"), is a per-line charge that recovers a portion of the LEC non-traffic sensitive loop costs apportioned to the interstate jurisdiction.

[8] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2078, 2083 (1987) (*Joint Board Recommendation);* Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, 2 FCC Rcd 2639 (1987) (*1987 Separations Order*). See the *SLC Billing Expense Order*, cited supra at n.3, for a more extensive discussion of the rules in place prior to 1987, the

three and five percent, respectively, for the expenses associated with billing and collecting interstate services, including the federal SLC, to be apportioned to the interstate jurisdiction. In 1987, the LECs performed nearly all of the billing and collecting functions for AT&T's interstate toll calls that originated on their lines. It was anticipated, however, that AT&T would assume these functions for many, and possibly all, interstate toll calls. Many of the comments that were filed prior to issuance of the Joint Board recommendation expressed concern that, under the new allocation procedures that had been proposed, the interstate allocation of LEC OB&C expenses would be reduced to zero if AT&T discontinued its use of LEC billing and collecting functions for interstate toll calls. The five percent minimum interstate factor was established to recognize that the LECs would continue to bill end users for the federal SLC.

5. The rule adopted in 1987 applied a formula that inadvertently set the interstate share of OB&C expenses at 33 percent for LECs that continued to provide billing and collecting functions for AT&T. Typically, the interstate allocations had been approximately 20 percent. This unanticipated result led the Commission, in 1988, on reconsideration to reinstate on an interim basis a portion of the allocation rules that were in effect prior to 1987.[9]

III. DISCUSSION

A. Permanent Revisions to OB&C Separations Procedures

6. In this Notice, we propose to replace the interim rules with permanent rules for allocating OB&C expenses between the jurisdictions. We believe that the permanent separations procedures for OB&C should reflect reasonable cost-causation principles, and should not be unnecessarily burdensome to implement and administer.

7. We also believe that OB&C expenses are generally not attributable to any specific service.[10] Therefore, it appears that an allocation procedure based on usage of individual services would not allocate costs more accurately than would a fixed allocation factor. Moreover, we believe that a fixed allocation factor would be administratively simpler and would bring greater certainty and auditability.

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rules adopted in 1987, and the interim rules currently in effect.

[9] *Reconsideration Order*, 3 FCC Rcd at 5523. See *SLC Billing Expense Order*, cited supra at n.3, for a more extensive discussion of these changes.

[10] For example, postage costs associated with customer service billings constitute a substantial portion of OB&C costs. Because several pages containing many itemized service charges can be included in a customer's bill without increasing the postage charge, such costs are not directly attributable to any individual service.

8. We therefore request that interested parties address two questions in their comments: First, should the allocation procedure that is applied to OB&C expenses be based on a fixed allocation factor, rather than on a direct measurement of (or surrogate for) actual interstate usage? Second, should the allocation factor be adjusted to reflect substantial changes in the IXCs' usage of LEC billing services? To facilitate the discussion, we propose four alternative fixed allocation methods and invite interested parties to propose other possible methods as well.

9. The first fixed allocation methodology would divide OB&C expenses equally among three subcategories: interstate toll; intrastate toll; and local exchange service. Under this procedure, one-third of the OB&C expenses would be allocated to the interstate exchange service jurisdiction (i.e., the interstate toll subcategory) and two-thirds would be allocated to the state jurisdiction (i.e., intrastate toll and local subcategories).

10. The second fixed allocation methodology would divide OB&C expenses equally among three subcategories: interstate toll; intrastate toll; and subscriber line. The expenses allocated to the subscriber line subcategory would be divided between the state and interstate jurisdictions by applying the basic allocation factors used to separate non-traffic sensitive subscriber plant (i.e., 75 percent would be allocated to the state jurisdiction, and 25 percent would be allocated to the interstate jurisdiction).[11] Under this procedure, the total interstate allocation would consist of the interstate toll allocation (approximately 33.3 percent of the total OB&C expenses) plus one-fourth of the subscriber line allocation (approximately 8.3 percent of total OB&C expenses). Thus, the total interstate OB&C allocation under this approach would be approximately 41.6 percent.

11. The third fixed allocation methodology would divide OB&C expenses equally among four subcategories: interstate toll; intrastate toll; local exchange service; and other intrastate services, including custom local area signalling services (CLASS).[12] Under this methodology, one-fourth of the expenses would be allocated to the interstate jurisdiction (i.e., the interstate toll subcategory) and three-fourths would be allocated to the state jurisdiction (i.e., the intrastate toll, local exchange service, and other intrastate service subcategories).

12. The fourth fixed allocation methodology would divide OB&C expenses equally among four subcategories: interstate toll; intrastate toll; subscriber line; and other intrastate services, including CLASS. Under this proposal, 31.25 percent of the total OB&C expenses would be allocated to the interstate jurisdiction (i.e., the interstate toll subcategory and one-fourth of the subscriber line subcategory[13]) and the remainder would be allocated to the state jurisdiction.

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[11] 47 C.F.R. §36.154(c) (1994).

[12] These services include number-translation services such as call-forwarding and caller identification.

[13] See n. 11, supra.

13. Parties commenting on these fixed allocation approaches should address both their reasonableness when applied to varied LEC circumstances, and the effects on the allocation of OB&C expenses if the IXCs substantially reduced their reliance on LECs to perform billing and collecting services. We also invite commenting parties to propose alternative or additional subcategories for allocation of OB&C expenses.[14]

B. Alternative Adjustment Mechanisms

14. The present interim OB&C procedures, as well as the fixed allocation methods that we have proposed, may require adjustment should the IXCs substantially reduce their use of LEC billing and collecting services. Adjustment of the OB&C allocations to toll categories may be necessary to offset such diminished usage of LEC billing services for IXC toll services. We invite comment on whether our permanent OB&C allocation rules should include a contingency provision that would alter separations procedures if IXCs assume billing and collecting functions, and if so, the form that the "trigger" provision should take.

15. At this time, we have no reason to expect that IXCs in the near term will assume any significant share of the billing functions the LECs currently perform for them. Therefore, it may not be necessary to craft a specific, alternative allocation approach for that contingency. In the event that an IXC or IXCs were to perform a substantial portion of these billing and collecting functions for themselves, we could review LEC petitions for waiver of these allocation procedures on an expedited basis, pending more general review of those procedures. In addition, we could, of course, order individual LEC allocation adjustments sua sponte if it became apparent that a LEC was no longer providing billing and collecting services for IXCs. We seek comment, therefore, on a threshold showing that would not categorically shift allocation procedures to a pre-determined alternative, but would establish a prima facie basis for expedited consideration of waiver requests.

16. We recognize that sua sponte actions and waiver proceedings may not be the most efficient means of adjusting allocation methods if circumstances change. As a consequence, we also request comment on the desirability of adopting a formula that would either reduce the interstate allocation of OB&C expense to reflect IXC assumption of billing and collecting functions or determine when a different fixed level allocation should be applied. To avoid making unnecessary changes in separations procedures and consequent apportionment shifts on the basis of minimal IXC takeback of billing and collecting functions, we believe that any formula adjustment or contingent fixed allocation should be made only if an IXC assumes responsibility for a substantial level of billing and collecting activity.

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[14] For example, some parties may propose the use of three, rather than two, toll subcategories: interstate toll, intrastate toll billed for other carriers, and the LEC's own intrastate toll. With respect to this proposal, parties should compare the effects of two versus three toll subcategories upon toll service competition.

17. We suggest two possible adjustment triggers. The first would permit an adjustment, or recourse to an alternative procedure, when a LEC loses 50 percent of its existing toll billing and collecting operations. The second would use the LEC's loss of its largest IXC customer to activate the alternative allocation procedure. Under either, we could adjust fixed allocation methodology results to reflect the decrease in the LEC's toll billing and collecting operations. We invite comment on these proposals and suggestions for alternative approaches. Parties should comment both on the method and quantitative standard for determining whether a sufficient loss of billing and collecting activity has occurred to require adjustment to the fixed allocation factor, and on the relationship between the proposed adjustment procedure and the general allocation procedures discussed above.

18. Finally, we invite parties to address the possibility that a LEC could lose all of its existing toll billing and collecting business from IXC customers. In particular, we ask for comment regarding whether we should prescribe a set percentage of OB&C expenses to be allocated to interstate services if a LEC no longer performs any interstate toll billing for IXCs. Parties advocating such an approach should propose a percentage to be used for allocating OB&C expenses to interstate services and explain the public interests that would be served by making such an allocation.

19. Accordingly, we invite comment on the separations procedures applicable to OB&C expenses and refer the issues to the Docket 80-286 Joint Board for a recommendation of a permanent solution. We request that parties address the extent to which the proposed procedures: (1) would reflect cost-causation principles; (2) would affect the division of costs between the jurisdictions; and (3) would be burdensome to implement and administer. We request that parties also address any other issues they believe may be of value in resolving this issue. Any comments filed should be as specific as possible, and should propose, where appropriate, specific rule amendments. Further, commenting parties should provide the factual basis for any conclusions reached.

IV. PROCEDURAL MATTERS

A. Ex Parte

20. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[15] In addition, under the modified ex parte procedures adopted in this proceeding, no written ex parte presentation shall be made during the

[15] See generally 47 C.F.R. §§1.1202, 1.1203, and 1.1206(a) (1994).

fifteen-day period immediately preceding a Joint Board meeting, nor shall any oral ex parte presentation be made during the seven days preceding a Joint Board meeting.[16]

B. Regulatory Flexibility

21. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate services affected by the proposed rule amendment generally are large corporations or affiliates of such corporations. Moreover, because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not "small entities" as defined by that Act.[17] The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of that Act.[18] Pub. L. No. 96-354, 94 stat. 1164, 5 U.S.C. Section 601 et seq (1981).

C. Comment Dates

22. We invite comment on the proposals set forth above. Interested parties must file initial comments on or before July 14, 1995 and reply comments on or before August 14, 1995. To file formally in this proceeding, interested parties must file an original and four copies of all comments. If interested parties want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies.

23. Interested parties should send comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Service, Inc., Room 140, 2100 M Street, N.W., Washington, D.C. 20037. We also ask that parties send a copy of their comments to each member of the Federal State Joint Board and its staff, as indicated in the attached service list. Comments will be available for public inspection during regular business hours in the Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information, contact Deborah Dupont at (202) 418-0850.

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[16] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 89 FCC 2d 36 (1982).

[17] See MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983).

[18] 5 U.S.C. §603(a) (1993).

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 4(j), 403, and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 403, and 410 (c), NOTICE IS HEREBY GIVEN of proposed permanent amendments to Part 36, Subpart D of the Commission's Rules, 47 C.F.R. §36, Subpart D, as described in the Notice of Proposed Rulemaking.

25. IT IS FURTHER ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §410(c), that the issues relating to permanent changes in the Commission's Part 36 Revenue Accounting Expense rules, 47 C.F.R. §§ 36.380, shall be and hereby are referred to the Federal State Joint Board established in the CC Docket No. 80-286 proceeding for a recommended decision regarding the issues raised herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FEDERAL-STATE JOINT BOARD SERVICE LIST

The Honorable Sharon L. Nelson, Chairman
Washington Utilities and Transportation Commission
Chandler Plaza Building
1300 South Evergreen Park Drive, S.W.
Olympia, Washington 98504-7250

The Honorable Cheryl L. Parrino, Chair
Wisconsin Public Service Commission
Post Office Box 7854
Madison, Wisconsin 53707-7854

The Honorable Stephen O. Hewlett, Commissioner
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

The Honorable Laska Schoenfelder, Chairman
South Dakota Public Utilities Commission
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The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W. - Room 814
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The Honorable Andrew C. Barrett, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 826, Stop 0105
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 832
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Deborah A. Dupont,
FCC Joint Board Staff Chair
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Common Carrier Bureau - Accounting & Audits Div.
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Petition of the Connecticut Department Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut	)))))	PR Docket No. 94-106

REPORT AND ORDER

Adopted: May 8, 1995; Released: May 19, 1995

By the Commission:

I. INTRODUCTION

1. On August 8, 1994, the Connecticut Department of Public Utility Control ("DPUC"), on behalf of the state, filed a petition with this Commission, requesting authority to continue regulating wholesale cellular service providers.[1] Six parties filed pleadings opposing the petition, and eleven parties filed pleadings supporting it.[2] By this action, we deny the petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio)

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[1] Petition of the Connecticut Department of Public Utility Control To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, PR File No. 94-106, filed Aug. 8, 1994 (hereinafter "Connecticut Petition").

[2] Parties that filed pleadings in this proceeding are listed in Appendix A.

telecommunications services.[3] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;[4] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[5] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[6]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.[7] As an exception to this general rule, Congress also provided that, if a state had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[8]

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state

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[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (1994) (*CMRS Second Report and Order*), *reconsideration pending*.

[5] National Telecommunications and Information Administration Organization Act, § 113(b)(1).

[6] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[7] *See* 47 U.S.C. § 332(c)(3)(A).

[8] *See* 47 U.S.C. § 332(c)(3)(B).

seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.[9] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[10]

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.[11] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.[12] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[13] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[14] In *Louisiana PSC* the

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[9] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[10] *Id.*, 9 FCC Rcd at 1421.

[11] *Id.*, 9 FCC Rcd at 1504.

[12] 47 C.F.R. § 20.13.

[13] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[14] Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service

Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[15] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

III. DECISIONAL FRAMEWORK

6. In order to prevail on the merits, the DPUC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[16] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record.[17] As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[18] have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

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may be preempted where the state regulation thwarts or impedes a valid Federal policy. *See* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm'ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[15] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[16] 47 U.S.C. § 332(c)(3).

[17] *E.g.*, CTIA Reply Comments at 1 (the proper standard for retaining state regulation depends upon a finding of insufficient competition, not market dominance); McCaw Comments at 11 (the DPUC must demonstrate that market conditions in Connecticut are substantially less competitive than the FCC found in its general assessment, that Federal remedies are inadequate to address such conditions, and that any residual benefits of state regulation outweigh the costs of regulation recognized by the Commission); BAMM Comments at 7-9 (the DPUC must demonstrate that its rate regulation is necessary to protect consumers); DPUC Reply Comments at 1; CTCS and CM Comments at 3 (Section 332 of the OBRA does not require a heightened standard of proof on the part of a petitioning state).

[18] Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the DPUC Petition is oriented to the provision of cellular service.

7. Since the Budget Act does not explicitly construe or elaborate on the statutory phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory[,]" we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[19] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.[20] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[21] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[22] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers' costs and earnings,[23] but may take account of non-cost considerations such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[24] These principles define basic components of a

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[19] *See* Crandon v. United States, 494 U.S. 152, 157 (1990); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[20] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[21] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886 (para. 25), 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

[22] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[23] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied,* Bass v. FPC, 392 U.S. 917 (1968) (upholding ratemaking based upon area-wide average costs).

[24] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here.

state's demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

8. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates.[25] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[26] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,[27] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[28]

9. Unlike some of the opponents of the DPUC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[29] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal

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The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies.

Id. at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

[25] 47 U.S.C. § 332(c)(3).

[26] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[27] 47 U.S.C. § 332(c)(1)(A).

[28] 47 U.S.C. § 332(c)(1)(C).

[29] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

of stimulating economic opportunity and competition;[30] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[31]

10. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[32] and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[33] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by

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[30] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

[31] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

[32] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

[33] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

establishing a stable, predictable regulatory environment that facilitates prudent business planning.[34]

11. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

12. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that Connecticut, or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.[35] Other Federal agencies have taken similar positions.[36] One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[37] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly

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[34] *Id.*

[35] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

[36] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

[37] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

prohibited state regulation of CMRS.[38] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[39]

13. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[40] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.[41] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[42] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

14. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by

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[38] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[39] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[40] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

[41] *See Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[42] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[43] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[44] not a policy that is balkanized state-by-state.

15. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[45]

> [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

16. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions[46] -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we

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[43] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[44] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[45] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

[46] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

17. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[47] and such conditions can produce good results for consumers.[48] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

18. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance ("SCP") analysis,[49] which is a standard paradigm of modern industrial organization analysis.[50] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry

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[47] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[48] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 15-46 (1982).

[49] Section 20.13(a)(1) requires states to include "demonstrative evidence" establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[50] *See, e.g.*, F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, 4-7 (3d ed. 1990) ("Scherer and Ross"); D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION, chs. 1, 9 (2d ed. 1994); J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 1-3 (1988).

structure and allows us to determine whether and how consumer interests are being served by such activity.

19. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce "specific allegations of fact," to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding "anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers."[51] We also requested "[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces," and we indicated that we would consider such evidence "especially probative."[52]

20. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[53] and "an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state."[54] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[55] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on "trends" in each commercial radio provider's rates and customer base[56] and on "opportunities for new providers to enter into the provision of competing services" as well as "an analysis of any barriers to such entry."[57] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they

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[51] 47 C.F.R. § 20.13(a)(2)(vi).

[52] 47 C.F.R. § 20.13(a)(2)(vii).

[53] 47 C.F.R. § 20.13(a)(2)(i) and (ii).

[54] 47 C.F.R. § 20.13(a)(2)(iv).

[55] 47 C.F.R. § 20.13(a)(2)(viii).

[56] 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

[57] 47 C.F.R. § 20.13(a)(2)(v).

see fit,[58] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

21. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

22. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[59] Under the case law potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,[60] and there is little doubt that PCS licensees will enter the market for CMRS in competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing Connecticut have committed to pay substantial

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[58] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[59] *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F.Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982- 83 (2d Cir. 1984). *See also* American Bar Association, I ANTITRUST LAW DEVELOPMENTS (THIRD) 307-11 (1992) and cases cited therein.

[60] *See* FTC v. Owens-Illinois, Inc., 681 F.Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

BROADBAND PCS AUCTION RESULTS

Connecticut					
MTA #	**Freq. Blk.**	**State**	**Market**	**Winning Bidder**	**Winning Bid**
M008	A	Maine	Boston-Providence	AT&T Wireless PCS Inc.	$121,660,000
M008	B	Maine	Boston-Providence	WirelessCo, L.P.	$127,065,892
M001	A	New York	New York	Omnipoint Corporation	$347,518,309[61]
M001	B	New York	New York	WirelessCo, L.P.	$442,712,000

23. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS

[61] This figure represents the amount to be paid by the pioneer's preference licensee, as required by Section 309(j)(13) of the Communications Act. *See* American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A; Cox Cable Communications, Inc., Los-Angeles-San Diego MTA #2, Frequency Block A; Omnipoint Communications, Inc., New York MTA #1, Frequency Block A; For Initial Authorizations in the Broadband Personal Communications Service, Memorandum Opinion and Order, 10 FCC Rcd 1101 (1994).

licensees.[62] The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[63] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

24. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

25. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates

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[62] *See, e.g.*, COMM. DAILY, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*" (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); COMM. DAILY, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, WASH. POST, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal – Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, INFORMATIONWEEK, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[63] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending*; *Craig O. McCaw*, 9 FCC Rcd at 5862-63.

underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

26. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.[64] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[65] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[66] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

27. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

IV. CONNECTICUT PETITION

A. Procedural Issues

28. The pleadings present two threshold procedural matters that we must address before addressing the Connecticut DPUC's petition on its merits. First, some parties argue that the petition should not be granted because it requests regulatory authority only

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[64] *See, e.g.*, J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 209-70 (1988).

[65] *Id.* at 239-70.

[66] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

over cellular service rather than all CMRS services, thereby violating what these opponents claim is the fundamental OBRA goal of achieving symmetrical regulatory treatment of CMRS. Second, Bell Atlantic has filed an application for review of the Bureau's determination to include the record of the Connecticut state proceeding in this Docket, subject in part to confidentiality procedures.

1. Cellular-Only Regulation

a. Pleadings of the Parties

29. Various parties argue that: (1) Congress revised Sec. 332 to establish regulatory parity, remedy the disparate regulatory treatment of similar forms of CMRS and create a uniform, nationwide regulatory regime; (2) by seeking to impose regulation only on cellular services, the Connecticut DPUC would impose inconsistent regulations on different CMRS providers, thereby creating precisely the asymmetrical regulatory conditions Congress sought to remedy; accordingly (3) the DPUC's petition must be rejected because it seeks to impose a type of regulatory regime expressly rejected by Congress.[67]

30. The Connecticut DPUC and its supporters dispute these arguments. While they acknowledge that regulatory parity is a goal of the OBRA, these parties argue that Congress expressly recognized that differential regulatory treatment of CMRS providers is permissible under the Act.[68] Many parties claim as well that there is no evidence in this record or elsewhere that non-cellular CMRS providers currently possess market power, thus making regulation of their activities inappropriate.[69]

b. Discussion

31. We have determined in other proceedings that while regulatory parity is an important policy that can yield important pro-competitive and pro-consumer benefits when appropriately applied, parity for its own sake is not required by any provision of the Communications Act.[70] Indeed, the amended Act allows us to adopt a flexible regulatory

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[67] *See e.g.*, AMTA Comments at 6, BAMM Comments at 6-7, CTIA Comments at 7-9, GTE Reply Comments at 3-6, McCaw Comments 7-11, Springwich Comments at 24-25.

[68] *E.g.*, OCC Reply Comments at 23; Nextel Reply Comments at 3-5.

[69] *E.g.*, AMTA Comments at 6; E.F. Johnson Comments at 4-5, MTel Reply Comments at 4-5.

[70] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, 9 FCC Rcd 7988 (1994) (*CMRS Third Report and Order*); Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, File No. ENF 93-44, 9 FCC Rcd 5836 (1994).

scheme that treats certain CMRS in a streamlined fashion.[71] Congress recognized that market conditions might warrant differential
regulatory treatment of CMRS, and explicitly granted us the authority to forbear from applying certain provisions of the Act.[72] That Congress understood such forbearance might be exercised selectively is not in doubt. As the OBRA Conference Report (at 491) states in explaining our forbearance authority:

> The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.[73]

32. Nothing in the record of this proceeding, or elsewhere to our knowledge, demonstrates that Congress intended to deny states similar flexibility with regard to the exercise of their CMRS regulatory authority. Thus, we are not persuaded by arguments that the Connecticut DPUC's request to regulate only cellular services is incongruent with regulatory parity concepts embedded in the OBRA.

2. Confidentiality

33. In the *First Confidentiality Order*, the Wireless Telecommunications Bureau (Bureau) noted that, while Connecticut twice submitted supporting materials accompanied by requests for confidential treatment, these requests failed to comply with our procedural rules.[74] BAMM and Springwich separately filed rate of return materials accompanied by requests for confidential treatment; these materials previously had been subject to limited disclosure pursuant to a protective order in the Connecticut proceeding.[75] The Bureau adopted in this proceeding the same protective order as Connecticut applied in its own investigation.

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[71] *See CMRS Second Report and Order*, 9 FCC Rcd at 1463.

[72] Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II, other than Sections 201, 202 or 208 may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A).

[73] The Conference Report further provides that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section." *Id.*

[74] *See* Petition of Public Utilities Commission, state of Hawaii, *et al.*, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-111, Jan. 25, 1995 at paras. 5-9 (*First Confidentiality Order*).

[75] *Id.*

34. In the *Second Confidentiality Order*, the Bureau considered Connecticut's third request for confidential treatment of supporting materials and granted that request as well as Connecticut's motion to accept the materials for filing.[76] These materials, confidential and public, were developed in the state's independent investigation of market conditions in Connecticut. The decision in that proceeding originally was submitted as an attachment to the DPUC petition.[77] The Bureau granted the confidentiality request only in part, however, under discretion provided by Section 0.459(f) of the Commission's Rules. The Bureau treated as confidential certain materials,[78] and denied confidential treatment to other materials, because the DPUC filing did not identify which of these materials were allegedly deserving of confidential treatment, nor describe reasons for their confidential treatment.[79]

35. Subsequently, BAMM and the Resellers filed applications for review of the *Second Confidentiality Order*. On its own motion, the Bureau reconsidered its decision to exclude from the record certain of the Connecticut materials, which resolved the Resellers' application.[80] BAMM, however, also contends that the Bureau violated unspecified Commission Rules by granting Connecticut's motion, and also violated Section 20.13 (a)(5) of our Rules by accepting a substantial pleading several months after the filing deadline specified in that rule.[81]

36. The Bureau granted Connecticut's motion for leave to accept the materials submitted because those materials are germane to the demonstration the state is required to make to support its petition.[82] The material submitted by Connecticut with this motion already was part of the state's proceeding. Excluding such materials effectively would have denied Connecticut the opportunity to make the demonstration required by the amended statute. BAMM acknowledges that Commission Staff advised it to await review of the

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[76] *See* Petition of Public Utilities Commission, State of Hawaii, *et al.*, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-208 Feb. 9, 1995 at para. 3 (*Second Confidentiality Order*).

[77] *See* DPUC Petition at Attachment (Decision of the Connecticut Department of Public Utility Control's Investigation into the Connecticut Cellular Service Market and Status of Competition, DPUC Docket No. 94-03-27, Aug. 8, 1994 (*Connecticut Decision*)).

[78] Listed in Section 2 of Appendix A of the *Second Confidentiality Order*.

[79] Listed in Section 3 of Appendix A of the *Second Confidentiality Order*.

[80] Petition of the Connecticut Department of Public Utility Control, PR Docket No. 94-106, DA 95-348, Feb. 24, 1995 at para. 3 *(Reconsideration of Second Confidentiality Order)*.

[81] BAMM's Application for Review at 2-5.

[82] *See Second Confidentiality Order*, paras. 7-11.

proffered state materials, and the corrective confidentiality order on reconsideration.[83] At that time, BAMM was afforded an opportunity to file supplemental comments on these materials and it has done so.[84] BAMM was a participant in the DPUC state proceedings, as are other parties to this docket; the Bureau's late acceptance of materials with which BAMM already was familiar imposes no hardship on BAMM given the opportunity for supplemental comments. The state proceedings, initiated with a view to filing an OBRA petition, are uniquely germane to the state's assertion of its residual rights under the amended Act. In these circumstances BAMM has not been harmed by the acceptance of the materials submitted. Further, any error committed as a result of the Bureau's failure to explicitly waive Section 20.13 when granting Connecticut's motion was harmless. BAMM's application for review accordingly is denied.

37. The excluded materials were entered into the record and given limited disclosure only to outside counsel and outside experts for parties to this proceeding, pursuant to the protective order adopted in the *First Confidentiality Order*.[85] The analysis of the Connecticut petition reflects consideration of supplemental comments and replies, based on these materials, submitted on March 10 and March 17, 1995.[86]

B. Summary of Request

38. Pursuant to its regulatory authority under state law, the Connecticut DPUC conducted a proceeding to examine cellular market conditions, including consumer protection issues.[87] The DPUC held seven days of hearings on this matter.[88] Connecticut states that the evidence offered in DPUC Docket No. 94-03-27 "indicates" that current market conditions sustain anti-competitive and discriminatory practices on the part of wholesale cellular providers.[89] Principally on this basis, Connecticut asserts that since current market conditions do not effectuate "true competition," it should retain jurisdiction over wholesale cellular providers.[90] Evidence of discriminatory and anti-competitive conduct on the part of the wholesale cellular carriers and their retail arms, Connecticut asserts, includes (1) market

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[83] *See* BAMM's Application for review at n. 2.

[84] *Reconsideration of Second Confidentiality Order* at 3.

[85] That protective Order is appended to the *First Confidentiality Order* as Appendix B.

[86] Parties filing pleadings based on confidential materials are listed in Appendix A.

[87] DPUC Petition at 1.

[88] *Id.*

[89] DPUC Petition at 2.

[90] DPUC Petition at 1-2.

tampering, (2) price fixing, (3) upside-down pricing (setting wholesale prices for resellers above the underlying carrier's retail price), and (4) unfair billing practices; as well as conduct arising directly from the wholesale carriers' relationship to their affiliated retail operations, specifically, (5) the use of information acquired from independent resellers by the wholesale carrier for the benefit of its resale affiliate, and (6) preferential pricing and practices designed to benefit the resale affiliate.

39. The DPUC also looked at the wholesale carriers' rates of return, market shares, and price levels. As to rates of return and overall service rates of the wholesale cellular providers, Connecticut states that while the record in the state proceeding shows that the cellular carriers have offered several promotions since 1987, there is no indication that these promotions have had any impact on the Connecticut market and its cellular end-users.[91] The DPUC states that it has determined that the greatest benefit from these promotions has been to the underlying carriers' own retail affiliates, because of the volume discount structure of the wholesale tariff.[92]

40. The DPUC's findings of fact in the state proceeding do not include any conclusions on the allegations of anti-competitive and discriminatory practices. The DPUC also stated as a finding of fact that the record of Docket No. 94-03-27 is inconclusive regarding the reasonableness of cellular carriers' rates of return and their financial performance since 1987.[93] In its reply comments, however, the DPUC states that:[94]

> the level of competition in Connecticut is not effective and that the DPUC should continue to regulate the wholesale cellular providers until they can satisfactorily demonstrate that other CMRS are effectively operating in their service territories and true competition is present in the marketplace.

41. The DPUC states that it intends to initiate a separate proceeding to examine this situation further. The purpose of the DPUC's contemplated further review is to ensure that there is a proper mix of management between the cellular carriers' wholesale and retail affiliates, and a proper relationship between the wholesaler and independent resellers.[95] In addition, the DPUC states that it intends to fully investigate the rates of return and rate structures of the wholesale providers and to investigate the relationship between the cellular

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[91] *Id.*

[92] *Id.*

[93] *See Connecticut Decision* at 30.

[94] DPUC Reply Comments at 2; *see also Connecticut Decision* at 31.

[95] DPUC Petition at 3-4.

carriers' costs and their service rates to ensure that customers receive fair, equitable and just rates.[96]

42. The DPUC acknowledges that new service providers (PCS, SMRs, and wide area SMRs) will provide acceptable alternatives to cellular service in the future, but it believes that these are not practical substitutes for cellular services at this time.[97] Connecticut also states that it appears that the highly concentrated nature of the Connecticut CMRS marketplace will not change significantly before the year 2003.[98]

C. Regulation for Which Continued Authority Is Sought

43. At present, Connecticut regulates its wholesale cellular providers under Section 16-250b of the Connecticut General Statutes. Under this regulatory scheme, the DPUC requires that all wholesale cellular tariff filings be cost-justified.[99] The DPUC monitors market conditions by requiring each carrier to keep complete records concerning carrier's rates and charges, services, and the conduct of operations.[100] The DPUC also requires each carrier to file quarterly financial reports.[101] These rules have been in effect since January 29, 1986. These regulations provide the DPUC with the standards and procedures for regulation of the wholesale cellular carriers' rates and charges, services, accounting practices, and safety and conduct of their operations.[102] In addition, the DPUC has adopted a shortened, five-day notice provision for tariff revisions affecting banded rates.[103] Connecticut seeks to retain regulatory control of the rates of wholesale cellular providers until it concludes a further review of conditions in the Connecticut wholesale cellular market. After the review, which is projected to conclude July 1, 1996, if the DPUC determines that the market is not truly competitive, Connecticut seeks to retain jurisdiction for an additional year, until October 1, 1997.

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[96] *Id.* at 4.

[97] *Id.*

[98] *Id.*

[99] DPUC Petition at Appendix G.

[100] *Id.*

[101] *Id.*

[102] DPUC Petition at 5; *see also* App. G (regulations).

[103] DPUC Petition at 5, *see also Connecticut Decision* at 30-31 (Finding of Fact 9). The previous notice provision required a thirty-day lag before proposed revisions could take effect.

D. Description of the Connecticut State Market

44. The subject wholesale cellular providers are Springwich Cellular Limited Partnership (Springwich), Bell Atlaatic Metro Mobile Companies (Bell Atlantic), and Litchfield County Cellular, Inc. (Litchfield). Springwich and Bell Atlantic provide wholesale cellular service in Connecticut's four New England County Metropolitan Areas (Hartford, New Haven, Fairfield, and New London) and the Windham Rural Service Area (RSA). Springwich and Litchfield provide wholesale cellular service in the Litchfield RSA. Springwich currently has 15 reseller subscribers, while Bell Atlantic has 11 reseller subscribers. Litchfield has no reseller subscribers.[104]

V. CASE ON THE MERITS

A. General Positions of the Parties

45. NCRA, Nextel,[105] CTCS, the Connecticut Office of Consumer Counsel, and the Attorney General of Connecticut strongly support the Connecticut DPUC's Petition to retain regulatory control of the rates of wholesale cellular carriers. AMTA, MTel, Pagemart, E.F. Johnson, PageNet, and PCIA are also supportive of the Petition, to the extent that it does not seek to extend rate regulation to paging services or other commercial mobile services.

46. BAMM, CTIA, GTE, McCaw, Springwich, and RCA oppose the Petition. PageNet and Pagemart oppose the Petition only with respect to paging services, arguing that the DPUC failed to sustain its burden of proof with respect to those services.[106]

47. In support of the DPUC's petition, the Attorney General argues that the Connecticut duopoly cellular market is not competitive.[107] Other commenters in support include NCRA and Nextel. They argue that facilities-based cellular providers have a "transmission bottleneck" that enables them to limit competition and "exact supracompetitive profits from the public."[108] NCRA has listed in an Appendix to its

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[104] DPUC Petition at 2.

[105] Nextel, however, opposes state rate regulation of "emerging non-dominant CMRS carriers, including ESMR and PCS providers." Nextel Comments at 12.

[106] Pagemart Reply Comments at 3-4; PageNet Reply Comments at 3.

[107] AG Comments at 3-4.

[108] Nextel Comments at 13, *citing* California Petition at 25 ("access to radio spectrum and switching facilities are deemed bottleneck facilities in the cellular market and that the facilities-based carriers' control of these bottleneck functions is the primary cause of resellers' diminished

comments the reports of eight Federal agencies, which it alleges have concluded that the cellular industry is not competitive.[109] Nextel also argues that the duopolist character of the cellular industry compels us to grant Connecticut's Petition.[110]

48. On the issue of substitutability and consequent competition from other types of commercial mobile services, Nextel contends that presently there are no "voice-grade" mobile services offering viable competition to cellular service. Nextel asserts that "[u]ntil effective competition develops, continued rate regulation may be necessary in some states to restrain the dominant market power of cellular duopolists."[111]

49. Those opposing the DPUC Petition point to various factors showing that the cellular market in Connecticut is sufficiently competitive to protect consumers adequately from unreasonable rates. BAMM states that evidence obtained in Docket No. 94-03-27 showed declining prices, high rates of subscriber growth, expanding service coverage, introduction of numerous new services, and intense competition between BAMM and Springwich over the past five years.[112] With respect to the Federal reports Connecticut relied on, BAMM particularly contends that NCRA's reliance upon the DOJ's reports is misplaced because "[n]one of the reports bear any relationship to whether CMRS rate regulation is necessary to protect consumers in Connecticut."[113]

50. Springwich states that subscribership in Connecticut for all commercial mobile services and for cellular services is predicted to continue to expand with the proliferation of new retail rate plans, the continued decline in wholesale prices, and the entry of new CMRS providers.[114] Springwich's year-end estimates for 1993 indicate 86,052 active

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contributions in the cellular marketplace"); NCRA Comments at 3.

[109] The list includes the *CMRS Second Report and Order*; Memorandum of the United States in Response to Bell Companies' Motions for Generic Wireless Waivers, Department of Justice, Civ. Action No. 82-0192, July 25, 1994; and Memorandum of the United States in Opposition to AT&T's Motion for a Waiver of Section 1(D) of the Decree in Connection with its Acquisition of McCaw, Department of Justice, Feb. 14, 1994.

[110] Nextel Comments at 9-10.

[111] *Id.* at 10, *citing*, in support, *Second CMRS Report and Order*, 9 FCC Rcd at 1470.

[112] BAMM Comments at 12.

[113] BAMM Reply Comments at 7, n. 11.

[114] Springwich Comments at 13.

cellular numbers, while BAMM reported 101,139 active cellular numbers for the same period.[115] Springwich adds that:

> The wholesale cellular carriers in Connecticut have made substantial network investment in response to...competition. Each of the carriers has made significant investments to expand network coverage through deployment of additional cell sites. Since it received a cellular license in 1985, Springwich has invested in its cellular network by expanding network coverage and facilities and thereby providing additional service value to be passed on by all cellular resellers to their cellular end users.[116]

51. Other commenters, opposing the Petition, also point to the growth rate for cellular as indicative of a competitive market. CTIA alleges that cellular subscribership is growing domestically at an annual rate of more than 40 percent and that only 16.7 percent of the national market has been tapped.[117] CTIA contends that this growth potential, in combination with high intra-industry and inter-industry "churn" rates and rapid technological development, evidences a dynamic and highly competitive cellular market.[118] Several commenters remark that this already-competitive market will become more competitive with the advent of PCS, SMRs, and wide area SMRs, and assert that these impending changes affect today's market and must be taken into account when evaluating its present capacity to protect consumers.[119]

B. Elements of the DPUC Case

1. Anticompetitive and Discriminatory Practices

a. Bulk Volume Discounts and Upside-Down Pricing

52. The Connecticut DPUC, as well as the State Attorney General and the Office of Consumer Counsel, allege that carriers' volume discounts favor their retail affiliates in two respects. First, their lowest wholesale price offerings require such a high volume that

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[115] *Id.*

[116] *Id.* at 14.

[117] CTIA Comments at 17.

[118] CTIA explains that "churn" rates reflect customer switching, among cellular providers in the case of "intra-industry" churn, or to other mobile services in the case of "inter-industry" churn. CTIA contends that the inter-industry churn rate approaches 16 percent. *Id.* at 14-15 and 23.

[119] *See, e.g.*, GTE Reply Comments at 11, CTIA Reply Comments at 5, and Springwich Comments at 15.

they exclude all but their affiliates from the best bulk rates.[120] The lowest discount rate offered is for activating over 20,000 cellular numbers, and only the carrier's own retail affiliates meet this requirement.[121]

53. Second, petitioners state that the record in the Connecticut proceeding (Docket No. 94-03-27) indicates that the retail affiliates currently offer rate plans for end users that are priced below the best rate at which the Resellers can purchase bulk service, given the volume discount structure.[122] CTCS contends that the wholesale carriers' pricing strategy is determined on a consolidated revenue method such that an effective rate is determined based on the overall economic effect of retail and wholesale rates offered in the market.[123] Consequently, the wholesale entity is pricing against the independent buyers. CTCS states that what the carriers "sparingly" give in wholesale rate reductions, they take away at retail by below-wholesale pricing, because the per-subscriber cost for the independent Resellers would increase if they offered service at below-wholesale cost.[124] In addition, the Resellers' overall margin would be reduced.[125]

54. The carriers contend that the discounts are contained in the wholesale carriers' tariffs which the DPUC approved.[126] Moreover, they attribute the fact that only retail affiliates currently receive the greatest discounts to the affiliates' better marketing strategies.[127] Bell Atlantic also contends that the allegations of "upside-down pricing" by the affiliated resellers were not accepted by the DPUC.[128] The Office of Consumer Counsel and the State Attorney General reply that the carriers' tariffs were approved under different

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[120] *See, e.g.*, DPUC Petition at 3, AG Comments at 3-4, OCC Comments at 9, OCC Reply Comments at 14-15, CTCS and CM Comments at 5-6, CTCS and CM Reply Comments at 26.

[121] *See* DPUC Petition at Appendix F (contains Bell Atlantic Metro Mobile's Rate Schedule at 3; Springwich Cellular Limited Partnership's Effective Rate Schedule at 1). BAMM's and Springwich's next lowest bulk rate is for 10,001-20,000 numbers; the corresponding BAMM rate discount is 0.5 percent less at this rate level and the Springwich rate is $1.00 less per month.

[122] DPUC Petition at 3.

[123] CTCS and CM Reply Comments at 25.

[124] CTCS and CM Reply Comments at 26.

[125] *Id.*

[126] *See* BAMM Comments at 22-24.

[127] *See* Springwich Comments at 31-32, 34.

[128] BAMM Comments at Appendix A24.

circumstances, and that the DPUC has the power and the responsibility to adjust its regulatory supervision to meet changing circumstances.[129]

b. Sharing Confidential Marketing Information

55. The DPUC, Attorney General, and Office of Consumer Counsel also allege that the wholesale carriers require independent resellers to divulge confidential information including their retail rates and competitive pricing strategies, which the wholesale carriers then share with their retail affiliates.[130] The state contends employees of SNET Cellular (Springwich's retail affiliate) have met with cellular service resellers to discuss retail rates and the impact independent resellers' rates would have on the Springwich retail affiliate.[131] Evidence also was offered that after Escotel, a reseller, discussed its marketing strategies with SNET Cellular employees, employees with access to such information were transferred to Springwich's affiliated retail operations.[132]

56. The wholesale carriers assert that such information is not required, and when it is volunteered, it is protected. Springwich adds that where there is any overlap in management responsibilities between Springwich and SNET Cellular, the companies have taken steps to ensure that wholesale and retail information is closely guarded and not shared.[133]

c. Relationship Between Wholesale Carriers and Their Retail Affiliates

57. Connecticut alleges that the close relationship between the wholesale providers and their retail affiliates puts the independent resellers at a distinct disadvantage. The DPUC considers the wholesale carriers' relationships with their retail affiliates to be anticompetitive, and asserts that this anticompetitive "atmosphere" requires continued DPUC oversight.[134] The DPUC also suggests that Springwich's retail affiliate has received an unfair competitive advantage because it has the most prominent advertising in every SNET Company Yellow Pages directory section.[135] Connecticut also alleges that this integral relationship has resulted in the ability of Springwich's retail affiliate to activate cellular

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[129] *See* OCC Reply Comments at 14-15; AG Reply Comments at 16.

[130] DPUC Petition at 3.

[131] *Connecticut Decision* at 23.

[132] *Id.*

[133] Springwich Comments at 38.

[134] *Connecticut Decision* at 26-27.

[135] OCC Reply Comments at 14.

numbers at times when other resellers were unable to do so, such as weekends and holidays.[136]

58. The carriers respond that their corporate structure is entirely consistent with the requirements of the FCC and state regulation.[137] Further, the carriers argue that the absence of corporate and managerial separation between wholesale and retail operations of the cellular carriers is not per se anti-competitive or discriminatory practice.[138] Springwich adds that, although it is not required to, it maintains strict cost separation between these operations to ensure the accurate allocation of costs.[139] Springwich also points out that the DPUC has not formally regulated wholesale carriers' corporate structures and has recognized such structures without requiring changes to them. In addition, both Springwich and BAMM acknowledge that, on one occasion over the past ten years, they each provided information concerning a new wholesale plan to their retail affiliate before notifying other resellers. Both carriers state that these were isolated instances, which were promptly corrected.[140]

d. Equal Access and Billing

59. Connecticut contends that Springwich's requirement that long distance calls be carried by its long distance affiliate is anti-competitive and "contradicts" the policy of the Connecticut General Assembly to promote telecommunications competition.[141] Springwich counters by arguing that: (1) providing equal access to long distance carriers for interstate calls outside the Springwich cellular network does not justify continued state rate regulation; (2) this practice is common among non-BOC cellular carriers; and, (3) since Connecticut is a single LATA state, equal access is, by definition, solely an interstate issue.[142] BAMM is required to provide equal access under the Modification of Final Judgment.[143]

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[136] *Id.*

[137] Springwich Reply Comments at 37-38.

[138] *Id.* at 17.

[139] Springwich Comments at 37.

[140] *Id.* at 38; BAMM Opposition at 20.

[141] *See* DPUC Petition at 3; OCC Comments at 8-9; AG Comments at 4, *citing* Public Act 94-83, *An Act Implementing the Recommendations of the Telecommunications Task Force.*

[142] Springwich Comments at 35.

[143] United States v. AT&T, 552 F.Supp. 131, (D.D.C. 1982) *aff'd sub. nom.* Maryland v. United States, 460 U.S. 1001 (1983).

60. Connecticut also disapproves of wholesale carriers' rounding practice in billing their airtime charges. Springwich bills on a per-minute basis and BAMM bills on a thirty-second basis; however, both companies apparently have the technical capability to bill at one-tenth second intervals.

2. Rate of Return, Price Levels, Market Share

61. Connecticut alleges that the cellular carriers have been earning what appear to be excessive rates of return for 1988-93.[144] The DPUC also recites OCC's assertion that wholesale cellular carriers' profit levels are evidence of the lack of effective competition.[145] OCC and the resellers contend that 15 percent is a reasonable rate of return for wholesale carriers.[146] The wholesale carriers suggest that a rate of return of 20.7 percent is reasonable.

62. The Attorney General states that BAMM and Springwich admitted on cross-examination before the DPUC that, with competition, rates could be 25 percent to 35 percent lower.[147] According to the Resellers, proper interpretation of the cellular carriers' financial information indicates excessive wholesale prices, which is consistent with the anticipated 25 percent rate reduction that will occur following new competitors' market entry.[148] The wholesale carriers maintain they are earning competitive rates of return.[149]

63. The Attorney General states that application of the HHI (Herfindahl-Hirschman Index) test indicates the "obvious" fact that the cellular carriers are duopolists.[150] The Attorney General argues that declining wholesale cellular rates do not prove competition

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[144] *See Connecticut Decision* at 9-11.

[145] *Id.* at 10.

[146] *Id.*

[147] *Connecticut Decision* at 9.

[148] *Id.* at 9.

[149] *See* Springwich Comments at 28-30; BAMM Comments at 13.

[150] AG Reply Comments at 10. The HHI is a means of measuring market concentration. It is calculated by squaring the market share of each market participant and then adding the squares. In antitrust analysis this calculation is made for both pre-merger and post-merger markets, with the difference representing the increase in market concentration that will result from the merger. The higher the pre-merger number, and the greater the increase to that number resulting from a merger, the more likely the merger may violate the antitrust laws. *See, e.g.*, FTC v. PPG Industries, Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986); F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (3rd ed. 1990) at 72.

in Connecticut, and alleges that the two major reductions in the past seven years occurred only because the carriers were petitioning for deregulation at those times.[151] The Attorney General also contends that once DPUC oversight is removed, there will be nothing to prevent BAMM and Springwich from raising their prices.[152]

64. Springwich (SNET) and BAMM (Bell Atlantic) provide wholesale cellular service in four MSAs, and Litchfield and Springwich provide wholesale service in one RSA. Springwich has 15 resale subscribers, BAMM has 11 resale subscribers, and Litchfield has none.[153] As of the end of 1993, BAMM and Springwich possessed 54 percent and 46 percent shares of the bulk wholesale cellular market, respectively.[154] The non-wireline carrier, BAMM, has been able to erode the wireline carrier's 100 percent market share to 46 percent in nine years.

65. Springwich and BAMM contend that the characteristics of the cellular marketplace in Connecticut, including the measure of market concentration produced by the HHI test, are a product of the duopoly structure adopted by the Commission for cellular services.[155] Springwich argues "the fact that such measures indicate that a two-carrier market is highly concentrated simply proves the obvious-- they do not, however, demonstrate that the concentrated market is not functioning in a competitive fashion."[156] Springwich states that competition in the wholesale cellular market intensified in 1992 when BAMM purchased the Band A non-wireline carrier in Connecticut.[157] Since BAMM now serves the larger share of the wholesale market, Springwich argues that this is incontrovertible evidence that vigorous competition exists.[158] Springwich states that since the introduction of cellular service, the carriers have regularly lowered wholesale rates, introduced service and rate promotions, and

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[151] AG Reply Comments at 11-12 ("BAMM's first such wholesale price change occurred in August, 1993, at the time hearings were scheduled in Docket No. 93-08-03; BAMM's second reduction in monthly access charges was announced during the course of the hearings held before the DPUC. Springwich responded by lowering prices also.").

[152] *Id.*

[153] DPUC Petition at 2.

[154] BAMM Comments at 12.

[155] *See* Springwich Comments at 19; BAMM Comments at 16-17.

[156] Springwich Comments at 20.

[157] Springwich Comments at 2-3.

[158] Springwich Comments at 3.

introduced other new improvements.[159] Springwich asserts that between 1990 and 1994, its monthly wholesale rates for cellular numbers decreased more than 11 percent before adjustment for inflation.[160] Springwich also asserts that rates for usage have declined significantly.[161] Springwich adds that these price reductions have come at the same time that network investment has increased and the carriers have incurred the significant cost of converting their networks to digital technology.[162] Over the past five years, the growth percentage in cellular subscribers in Connecticut has averaged in the double digits. Springwich's year-end estimates for 1993 indicate 86,052 active cellular numbers, and BAMM reported 101,138 active cellular numbers for the same period.[163]

66. The DPUC counters the carriers' arguments by asserting that the wholesale cellular market is closed to entry, that the service offered therein is homogenous, and that neither carrier can alter significantly the quality or characteristics of the service it provides, relative to its competitor.[164] Since part of the homogeneity is that of costs, the DPUC claims, this makes for implicit price collusion because each carrier knows the other carrier has the same general cost profile.[165]

C. Discussion

1. Introduction

67. In order to continue regulation of intrastate cellular rates, Connecticut must prove that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[166] Connecticut has not satisfied the statutory requirement.

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[159] *See* Springwich Comments at 3 and Springwich Reply Comments at 8.

[160] Springwich Comments at 16 and Ex.7, Springwich states that "last month, (*i.e.*, August 12, 1994), in response to a rate reduction by BAMM and the changing market conditions, Springwich announced an additional 35 percent decrease in monthly wholesale rates for cellular numbers." *Id.*

[161] "Before adjustment for inflation, Springwich's per minute rates for peak usage have decreased more than 15 percent and per minute rates for off-peak usage have declined roughly 25 percent since 1990." *Id. See also* Springwich's Exhibit 7, filed with Comments.

[162] Springwich Comments at 16.

[163] Springwich Comments at 13.

[164] DPUC Reply Comments at Appendix A, Testimony of Mr. King, pp. 785-797.

[165] *Id.*

[166] *See* 47 U.S.C. § 332(c)(3)(A).

68. Our decision is based in part on the fact that the DPUC, upon completion of its own investigation of cellular market conditions less than one year ago, did not conclude that market conditions fail to protect consumers. While the DPUC found that "the record...is inconclusive relative to the cellular carriers' rate of return and their financial performance since 1987[,]" it did not find that these data demonstrated unjust or unreasonable, or unjustly or unreasonably discriminatory rates.[167] The DPUC's findings concerning overall pricing behavior also were inconclusive.[168] Moreover, the record does not indicate that the state has initiated any subsequent proceeding directed specifically at reductions or structural changes in carrier rates. Although its investigation revealed sufficient evidence of cellular market imperfections to cause the DPUC concern, and it has decided to continue monitoring market activities,[169] the investigation apparently did not yield sufficient evidence to support a finding -- *by the DPUC itself* -- that market conditions fail to protect consumers. No additional information has been filed in the record of this proceeding that would cause us to question the DPUC's own judgment in this regard.

69. There are other bases for our decision. First, unrebutted evidence shows that cellular rates in Connecticut are declining. Second, the DPUC Petition does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Third, Connecticut presents no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS. Fourth, Connecticut does not present evidence showing widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist. Fifth, Connecticut fails to present any analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers).[170]

70. Another weakness of the DPUC's Petition is that it views any evidence of market imperfection as proof of a need for continued rate regulation, while all countervailing evidence is attributed to its regulatory oversight. Even assuming such an argument is reasonable in theory, the DPUC has not established its factual predicate. The DPUC does not appear to have prescribed any particular pricing or rate development formula, and with minor exceptions, all currently effective and previously effective cellular rates in Connecticut appear to have been carrier-initiated. On this record, we are not persuaded by the DPUC's implicit argument that, absent continuation of its rate regulation authority, even for a limited

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[167] *See Connecticut Decision* at 30.

[168] *See* paras. 39-41, *supra.*

[169] *See Connecticut Decision* at 32.

[170] An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price. *See* para. 25, *supra.* No such demonstration exists on this record.

period of time, cellular rates will quickly fall outside the zone of reasonableness. Thus, we conclude that the DPUC's demonstration is unpersuasive when viewed as a whole. As discussed below, none of the specific allegations presented by the DPUC cause us to alter this conclusion.

2. Anti-Competitive and Discriminatory Practices

a. Bulk Volume Discounts and Upside-Down Pricing

71. As noted previously, Connecticut asserts that the facility-based carriers' tariffed rates unreasonably favor their retail affiliates because only those affiliates qualify for the largest bulk discounts. We believe it is of decisional significance that these rates were subject to DPUC review before they took effect, and that they have been reviewed since then by the DPUC without any action by that agency to modify them. Moreover, there is no suggestion in this record that facility-based cellular carriers are charging different rates for the same service, based on a customer's identity. Nor has Connecticut shown that the volume discounts lack an adequate economic justification. Under these circumstances, the DPUC's evidence on this point is unpersuasive.

b. Sharing of Confidential Marketing Information

72. Connecticut asserts that Springwich requires independent resellers who compete with its retail arm to divulge competitively sensitive marketing and/or planning information, as a condition of receiving wholesale service, and offers two examples of this alleged practice.[171] Connecticut states that it believes that these examples "[require] further review and regulation by the [DPUC]."[172] Springwich contends that such information is not required of independent resellers, and when it is volunteered it is protected.[173] Springwich also contends that where management responsibilities for Springwich and SNET Cellular overlap, the companies have taken steps to ensure that wholesale and retail information is not shared. Connecticut has not rebutted Springwich's assertions. Thus, Connecticut has not established a sufficient factual basis to accord significant weight to its concerns about carriers' marketing practices.

c. Integral Relationship Between the Wholesale Carriers and Their Retail Affiliates

73. Connecticut also asserts that the close relationship between the wholesale providers and their retail affiliates puts the independent resellers at a distinct disadvantage.

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[171] *See* para. 55, *supra.*

[172] *Connecticut Decision* at 26.

[173] *See* para. 56, *supra.*

The principal basis of Connecticut's assertion is the lack of separation between the wholesale operations of BAMM or Springwich and their respective retail affiliates.[174] However, no DPUC regulation (or Federal rule) requires carriers to separate their wholesale and retail operations. Thus, carriers could operate on a fully integrated basis, with all the internal coordination such operations imply. Although the DPUC has identified two instances in which a wholesale carrier appears to have favored its retail affiliate over non-affiliated resellers, such evidence does not establish a pattern of anticompetitive activity and does not support a request to continue rate regulation. For these reasons, and for the reasons expressed in para. 59, *supra*, the record does not provide a basis for according significant weight to the state's presentation on this issue.

d. Equal Access and Billing

74. Connecticut asserts that Springwich's requirement that long distance calls be carried by its long distance affiliate is anti-competitive and "contradicts" the policy of the Connecticut General Assembly of promoting telecommunications competition.[175] The DPUC also asserts that wholesale carriers' billing practices warrant a continuation of rate regulation authority. However, the DPUC examined such issues last year and did not, to our knowledge, take remedial action. Again, we note that the practices the DPUC complains of do not violate any extant state or Federal regulation.[176] On this record, we are not persuaded the DPUC has made a case for continued rate regulation.

3. Rate of Return; Price Levels; Market Share

75. The DPUC's contentions concerning evidence of rates of return, market share and price levels are similarly unpersuasive. First, although in its Petition the DPUC asserts that wholesale carriers' returns exceed "competitive" earnings levels, in the DPUC's own investigation it concluded that the record is "inconclusive" regarding the reasonableness of those carriers' returns and financial performance.[177] This discrepancy is not explained by the DPUC. Moreover, the record in this proceeding shows that those carriers continue to invest heavily in building out their networks, and the DPUC has not presented evidence that carriers are restricting output in order to raise prices. Thus, the DPUC's evidence falls short of the showing necessary to convince us that wholesale carriers' financial performance provides a basis for continued rate regulation.

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[174] *See* para. 57, *supra*.

[175] *See* para. 59, *supra*.

[176] We are examining the issue of CMRS equal access in a pending rulemaking. *See* In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking, 9 FCC Rcd 5408 (1994).

[177] *Connecticut Decision* at 30 (Finding of fact No. 7).

76. Second, the evidence shows that wholesale prices in Connecticut are declining, especially since 1993. We also note that cellular subscribers have increased significantly, and that the DPUC has not adduced any evidence that subscribers are dissatisfied with the service they are receiving. This evidence of price decreases, coupled with the absence of any showing of consumer complaints concerning price levels, leads us to conclude that the DPUC has not demonstrated that cellular rate levels are unjust or unreasonable.

77. The record demonstrates that carriers' market shares have shifted significantly. In the nine years since the advent of the non-wireline operator's service, the first entrant's share has declined from 100 to 46 percent. Although the market shares of individual independent resellers apparently have declined or not grown significantly, the record does not establish a causal link between those data and anticompetitive actions by wholesale carriers. On this record, it is as likely that these market share data could be attributed to individual carrier's efficiencies and marketing practices. The evidence does not demonstrate that market conditions fail to protect subscribers adequately against unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates. For this reason, and the reasons discussed previously, we deny the DPUC's petition.

VI. REGULATION OF OTHER TERMS AND CONDITIONS

78. Prior to OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless telecommunications carriers.[178] This prohibition was construed broadly to preclude almost all state regulatory activity.[179] As revised by OBRA,

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[178] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3) (prior to revisions enacted by OBRA).

[179] *See, e.g.*, Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.*, American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services. Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 (para. 24 n.19) (1990):

Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the DPUC is entitled to continue, despite our denial of its Petition.

79. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:[180]

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

80. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the DPUC Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

81. First, although the DPUC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint proceedings

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If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

[180] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

may concern carrier practices, separate and apart from their rates.[181] In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit Connecticut to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

82. Second, under the same logic, we also conclude generally that several other aspects of a state's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the public utility commission, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe Connecticut retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state. We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of the Connecticut regulatory practice at issue.

VII. ORDERING CLAUSES

83. Accordingly, pursuant to Section 332 (c)(3) of the Communications Act, 47 U.S.C. § 332 (c) (3), IT IS ORDERED that the Petition To Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, filed by the Connecticut Department of Public Utility Control, IS DENIED for the reasons set forth above.

84. IT IS FURTHER ORDERED that the applications for review filed by Connecticut Telephone and Communications Systems, Inc. and Connecticut Mobilecom, Inc. (Resellers) and by Bell Atlantic Metro Mobile Companies (BAMM) ARE DENIED.

85. IT IS FURTHER ORDERED that the requests for confidential treatment of return data submitted by Springwich and Bell Atlantic ARE DISMISSED AS MOOT in light of the Bureau's determinations in the *Second Confidentiality Order* and the *Reconsideration of Second Confidentiality Order*.

86. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order

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[181] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a) (emphasis added).

SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[182]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[182] Although we assigned the DPUC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

APPENDIX A

PR Docket No. 94-106 (Connecticut)

List of Parties Filing Comments

American Mobile Telecommunications Association, Inc. (AMTA)

Attorney General of the State of Connecticut (AG)

Bell Atlantic Metro Mobile Companies (BAMM)

Cellular Telecommunications Industry Association (CTIA)

Connecticut Office of Consumer Counsel (OCC)

Connecticut Telephone and Communication Systems, Inc. and Connecticut Mobilecom, Inc. (CTCS and CM, "The Resellers")

E.F. Johnson Company (E.F. Johnson)

GTE Service Corp. on behalf of GTE Mobilnet, Inc. and Contel Cellular, Inc. (GTE)

McCaw Cellular Communications, Inc. (McCaw)

Mobile Telecommunication Technologies Corp. (MTel)

National Cellular Resellers Association (NCRA)

Nextel Communications, Inc. (Nextel)

Paging Network, Inc. (PageNet)

Personal Communications Industry Association (PCIA)

Springwich Cellular Limited Partnership (Springwich)

List of Parties Filing Reply Comments

PageMart, Inc. (Pagemart)

Rural Cellular Association (RCA)

Bell Atlantic Metro Mobile Companies (BAMM)

Cellular Telecommunications Industry Association (CTIA)

Connecticut Attorney General (AG)

Connecticut Department of Public Utility Control (DPUC)

Connecticut Office of Consumer Counsel (OCC)

Connecticut Telephone and Communication Systems, Inc. and Connecticut Mobilecom, Inc. (CTCS and CM, "Resellers")

GTE Service Corporation (GTE)

McCaw Cellular Communications, Inc. (McCaw)

Mobile Telecommunication Technologies Corp. (MTel)

Nextel Communications, Inc. (Nextel)

Springwich Cellular Limited Partnership (Springwich)

List of Parties Filing Supplemental Comments Related to Confidentiality

Bell Atlantic Metro Mobile Companies (BAMM)

Connecticut Attorney General (AG)

Connecticut Telephone and Communication Systems, Inc. and Connecticut Mobilecom, Inc. (CTCS and CM, "The Resellers")

Springwich Cellular Limited Partnership (Springwich)

APPENDIX B

SCI/Springwich Partnership Wholesale Prices

	1/1/87	1/1/90	1/1/93	1/1/94	6/27/94	Change
60 Minutes	$42.08	$42.08	$39.08	$34.08	$34.08	19.0%
120 Minutes	$59.09	$59.09	$53.09	$48.09	$48.09	18.6%
480 Minutes	$161.15	$161.15	$137.15	$132.15	$132.15	18.0%

Assumptions: 7500 numbers, 1,000,000 peak minutes and 250,000 off-peak minutes. (Those number are in the middle of the various available tiers.)
80% of minutes are peak.
1/1/87 and 1/1/90 60 minute prices exclude effect of 100 minute minimum per month per cellular number.
1/1/94 prices include a promotion lowering the monthly access charge by $2. That promotion was permanent by 6/27/94.
6/27/94 prices exclude effect of $0.05 promotion for weekend off-peak minutes. (Lowering all off-peak minute charges by $0.05 would reduce 60, 120, and 480 minute prices by $0.60, $1.20 and $4.80, respectively.)
Price reductions prior to 1/1/93 were due to reduced per minute charges; after 1/1/93 reductions were primarily due to reductions in monthly access charges.
Springwich also states that the monthly access charge fell by an average of 35% per tier. The effect of that change would be about $7 per user.

Sources: Connecticut Petition, Appendix 3, Springwich Cellular Limited Partnership Tariffs For Services Furnished in the State of Connecticut, Effective Rates Pages 1 and 2, Effective June, 27, 1994; and Comments of Springwich Cellular Limited Partnership, Sept. 19, 1994, at Exh. 7.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Service Charges, and Bidder's Information Packages in Connection With Auctionable Services	)	WT Docket No. 95-69

Notice of Proposed Rulemaking

Adopted: May 16, 1995 **Released:** May 16, 1995

Comment Date: May 31, 1995
Reply Comment Date: June 5, 1995

By the Commission:

I. INTRODUCTION

1. By this Notice of Proposed Rulemaking, the Commission begins a proceeding to establish a schedule of fees applicable to the remote electronic filing, remote access to applications filed with the Commission, remote bidding and the bidder's information packages available to participants in future Commission auctions.

II. BACKGROUND

2. In previous FCC auctions, bidders have paid auction contractors of the Commission fees consisting of the contractors' costs and a reasonable profit for remote bidding software and an on-line access charge. Because the Commission will provide such services directly to bidders, we propose that the bidders pay such fees to the Commission. The Independent Offices Appropriation Act of 1952, as amended ("IOAA"), codified at 31 U.S.C. § 9701, permits fees and charges for Government services and things of value. "It is the sense of Congress that each service or thing of value provided by an agency ... to a person ... is to be self-sustaining to the extent possible." 31 U.S.C. § 9701(a). The IOAA, therefore, authorizes agencies to prescribe regulations that establish charges for products and services provided by the agency. The charges must be fair and must be based on the costs to the Government, the value of the service or thing to the recipient, the public policy or interest served, and other relevant facts. See 31 U.S.C. § 9701(b).

3. Since 1959, the Office of Management and Budget ("OMB") has issued policy guidance on fees through Circular A-25 ("OMB Circular"). See FPC v. New England Power Co., 415 U.S. 345, 349-51 (1974) (citing the OMB Circular). On July 15, 1993, OMB published a revised version of the OMB Circular in the Federal Register (58 Fed. Reg. 38142), which provides updated policy guidance on user fees. Pursuant to the revised OMB Circular, the imposition of fees for Government-provided products and services that confer benefits on identifiable recipients over and above those benefits received by the general public are encouraged. Pursuant to the OMB Circular, each agency, in establishing fees or other charges,

is to select between "full cost"[1] or "market price"[2] in its calculation of the charges.

4. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103 - 66, 107 Stat. 312, added a new section 309(j) to the Communications Act of 1934, 47 U.S.C. § 309(j). This amendment to the Communications Act authorized the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for initial licenses for use of the radio spectrum. Pursuant to this authority, the Commission has conducted three simultaneous multiple round auctions for Personal Communications Service ("PCS") licenses.[3]

5. In each of the three PCS auctions, bids were placed electronically using a computer bidding system designed and developed by the FCC in conjunction with its auction contractors. In the Nationwide Narrowband PCS auction, bidders were required to be physically present at the auction site to place their bids using the on-site electronic bidding system. The FCC, in conjunction with its auction contractors, developed a new electronic bidding system for the Regional Narrowband PCS auction which offered bidders the choice of placing their bids: (1) using the on-site electronic bidding system; (2) from remote locations using the bidder on-line electronic bidding software; or (3) from remote locations using FCC operator-assisted telephonic bidding. With certain enhancements and upgrades, this system was used again in the Broadband MTA auction.

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[1]The OMB Circular provides that "full cost" includes all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service. 58 Fed. Reg. at 38145. These costs include, but are not limited to, an appropriate share of: (a) direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement, including all funded or unfunded accrued retirement costs not covered by employee contributions; (b) physical overhead, consulting, and other indirect costs, including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment; if imputed rental costs are applied, they should include depreciation of structures and equipment, based on official Internal Revenue Service depreciation guidelines unless better estimates are available and an annual rate of return (equal to the average long-term Treasury bond rate) on land, structures, equipment and other capital resources used; (c) the management and supervisory costs; and (d) the costs of enforcement, collection, research, establishment of standards, and regulation, including any environmental impact statements. Id.

[2]The OMB Circular provides that "market price" means the price for a good, resource, or service that is based on competition in open markets, and creates neither a shortage nor a surplus of the good, resource, or service. 58 Fed. Reg. at 38145. When a substantial competitive demand exists for a good, resource, or service, its market price will be determined using commercial practices, e.g., either by competitive bidding or by reference to prevailing prices in competitive markets for goods, resources, or services that are same or similar to those provided by the Government with adjustments as appropriate that reflect demand, level of service, and quality of the good or service. In the absence of substantial competitive demand, market price will be determined by taking into account the prevailing prices for goods, resources, or services that are the same or substantially similar to those provided by the Government, and then adjusting the supply made available and/or price of the good, resource, or service so that there will be neither a shortage nor a surplus. Id.

[3]These three auctions included: (1) the Nationwide Narrowband PCS auction, held from July 25 through July 29, 1994; (2) the Regional Narrowband PCS auction, held October 26 through November 8, 1994; and (3) the Broadband A and B Block PCS auction, held December 5, 1994, through March 13, 1995 (also known as the Broadband Major Trading Area ("MTA") auction).

6. The Commission and its auction contractors incurred significant costs in developing the on-site electronic bidding systems used in these auctions and the remote electronic bidding system used in the Regional Narrowband PCS auction and the Broadband MTA auction. The Commission recovered its development costs for the electronic bidding system for the first three auctions from the proceeds of those auctions. See 47 U.S.C. § 309(j)(8). In addition, the FCC's auction contractor, Business Information Network (BIN), was permitted to charge bidders electing to use the on-line remote bidding system a $200.00 fee for the proprietary remote bidding software package and a $23.00 per-hour on-line access charge. This charge was calculated to compensate BIN for its costs plus a reasonable profit in developing the remote access bidding software. Bidders in the Regional Narrowband PCS auction and the Broadband MTA auction were also offered the option of bidding on-site or telephonically at no charge.

7. The FCC has determined, based on its recent auction experience, that remote electronic bidding provides bidders with an important and valuable service as it enables them to place and withdraw bids, access auction round results and other FCC announcements during the auction from their offices using their personal computer. Thus, bidders are not required to be physically present at the auction site for the duration of the auction. In this regard, we note that a majority of bidders in the Regional Narrowband and Broadband MTA auctions used the remote electronic bidding system to participate in the auction. Therefore, the FCC has determined that remote electronic bidding will be an important feature in future auctions. Accordingly, the Commission has developed its own remote on-line bidding system that will be offered as a convenience to bidders in future FCC auctions. The FCC's remote electronic bidding system will enable bidders to participate in FCC auctions, review applications and access auction round results information from remote locations using a Wide Area Network to connect with the bidding system via a 900 telephone service ("900 service").[4] It is contemplated that bidders will continue to have the option of placing their bids telephonically from remote locations via an 800 telephone service at no charge. Round results information is also available to remote access bidders over the Internet and the FCC's Bulletin Board at no charge.

III. DISCUSSION

8. The Federal Government has incurred significant costs and expenses in developing its remote electronic auction systems. The costs include infrastructure design and implementation, software development, software testing, and administrative and personnel costs associated with this process. We propose to recover these costs to the Government pursuant to the IOAA by charging bidders who elect to bid electronically from remote locations a fee for the remote bidding software and for remote access to the bidding system. We believe that imposing a fee on those bidders who actually use the remote electronic bidding system is the fairest and most equitable means for the Government to recover its costs in developing, maintaining, enhancing, and upgrading the remote auction systems. In previous FCC auctions, we have permitted our auction contractors to recover their costs plus a reasonable profit by charging bidders a fee for the remote bidding software and an on-line access charge. Since the FCC will now provide these services directly to bidders, we propose to recover the Government's costs by charging bidders a fee for the remote electronic bidding software and an on-line access charge via the 900 service. Additionally, as we proceed with future auctions, we may adopt new rules or modify our existing rules and the software may need to be adjusted to implement these new rules. As a result, the Government may incur additional costs as the auctions proceed. To recover these costs as well as to recover the costs of printing bidder's information packages, the Commission proposes to institute a new schedule of fees. Any funds received from the sale of auction materials, software,

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[4]The General Services Administration is currently in the process of making arrangements to add 900 service to the Federal Telecommunications System 2000 contract, i.e., to the Government-wide telephone system.

or services must go directly to the U.S. Treasury. Unless an agency is specifically authorized by statute to retain outside monies it receives, such monies must be deposited in the Treasury as "miscellaneous receipts." See 31 U.S.C. § 3302(b); 69 Comp. Gen. 260, 262 (1990).

9. For the fees proposed below, the Commission has followed the guidance provided by the OMB Circular and relevant court cases[5] in calculating the costs of the products and services to be provided by the Commission. As previously mentioned, each agency, in establishing charges, is to select between "full cost" or "market price" in its calculation of the charges. Upon initial review of both methodologies (see footnotes 1 and 2, supra), we propose to utilize "market price" in establishing the proposed fees because we believe it is simpler, practical, efficient, and more easily ascertainable than utilizing the "full cost" approach. More particularly, we propose to utilize the prevailing price methodology for remote access to the FCC auction systems, remote access software packages and the bidder's information package. Pursuant to the IOAA, the OMB Circular, and the findings outlined below, the Commission, therefore, is proposing fees for the following products and services that confer a special benefit on identifiable recipients and interested persons: $4.00 per minute for electronic access through a 900 telephone number service ("900 service") to access the FCC Remote Access System (to submit bids, file applications electronically, obtain round results data, review filed applications, etc.); $200.00 per bidding software package; one bidder's information package will be provided to each entity free of charge and there will be a $16.00 charge for each additional bidder's information package (including postage) requested by the same person or entity. Appendix B sets forth the proposed rules for establishing these fees.

10. 900 Service. The Commission will institute a 900 Telephone Service from a long distance telephone carrier which will provide bidders with the option of participating in the auction electronically from remote locations. This service will enable bidders to submit FCC applications on-line, review submitted applications, place and withdraw auction bids, and access round results from remote locations. The primary difference between 900 telephone service and 800 telephone service is the party responsible for paying for the service (900 Telephone service is paid for by the dialing party, while 800 telephone service is paid for by the party that orders the service, in this case the FCC). Both 800 and 900 number services provide a detailed accounting of the initiating phone numbers, which is critical for electronic forms filing and auction bidding. This reporting function is necessary in order for the Commission to perform its audit functions. Direct dial telephone service (i.e., 202 exchange) does not provide the reporting that is essential to the security of the auction programs. The proposed charges for the 900 service will recover the costs incurred by the Government in installing the service and will also defray the infrastructure design and implementation, hardware and software development costs. FCC license and auction applicants may still submit their applications in hard copy and bidders will continue to have the option of bidding telephonically from remote locations and accessing round results via the Internet or the FCC Bulletin Board Service free of charge. As always, applications will be available for inspection in the applicable reference room and the Public Notices that identify accepted, incomplete and rejected applications will be available over the Internet free of charge. The proposed fee for 900 service is based on our survey of the charges for similar on-line services. The services surveyed were primarily on-line reference and research services operating in the open market with sufficient competition to establish a market-based price. Our sampling revealed that prices currently range from $4.05 per minute charged by Westlaw, to $4.42 per minute charged by Lexis-Nexis (plus monthly account maintenance fees charged by both vendors). While the average price for this type of service is $4.23 per minute, we believe

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[5]See, e.g., National Cable Television Ass'n, Inc. v. F.C.C., 554 F.2d 1094 (1976) ("Fee" is payment for special privilege or service rendered, and not revenue measure; and if "fee" unreasonably exceeds value of specific services for which it is charged, it will be held invalid); and Engine Manufacturers Ass'n v. E.P.A., 20 F.3d 1177 (1994).

that charging a fee of $4.00 per minute would be fair and reasonable. Because the on-line time under the Commission's remote on-line bidding system will be considerably less than that required via the previously offered commercial service, this factor further supports the reasonableness of a fee of $4.00 per minute. We seek comment on these proposed charges.

11. Remote Access Bidding Software. The remote access bidding software will enable bidders to submit and withdraw bids from remote locations (e.g., from their offices using their own personal computers). In addition, the software is interactive and will provide bidders with automatic feedback by displaying applicable error messages and confirmation of submitted bids and withdrawals. Also, the bidder software will enable bidders to download auction round results files and access other auction information. The proposed fee for the remote access bidding software packages was based on the open market prices for similar software packages. Our research indicated that the most comparable software package currently available is $200.00 per package and offered by only one supplier, BIN, the FCC's auction contractor in the Regional Narrowband and Broadband MTA auctions. Given the highly specialized nature of the remote access software, we were unable to identify other comparable software packages for which we could obtain additional market price information. Therefore, we propose to charge a similar fee of $200.00 for each software package.[6] We seek comment on whether this proposed fee is fair and reasonable and seek additional market price information for other comparable software packages.

12. Bidder's Information Packages. Prior to each auction, the Commission publishes a bidder's information package containing a description of the licenses to be auctioned, the procedures, terms, and conditions, relevant Public Notices, Commission Orders, and other essential documents and information relating to that auction. Each person or entity will be provided one bidder's information package for each auction free of charge. We propose, however, to charge a fee of $16.00 for each additional bidder's information package requested by that same person or entity. The proposed fee for each additional bidder's information package was developed by comparing the average cost of producing bidder's information packages in the open market among commercial printing firms. The previous prices ranged from $13.50, provided by Balmar Printing and Graphics, to $18.50, provided by PIP Printing (both figures include postage). Based on the average of this range, we believe that charging a fee of $16.00 per package would be fair and reasonable. We seek comment on this proposed fee.

13. We propose to use the following payment procedures to collect the above-described fees. The fee for the 900 service will appear as a charge on the user's monthly telephone bill; the fees for the software packages and the bidder's information packages will be collected by the Commission's auction contractor.[7] Interested parties will be permitted to pay by credit card for the software and bidder's information packages. We believe that credit card payment is the most convenient and reliable method of payment both for bidders and for the Commission. Cashier's checks also will be accepted, although we will strongly encourage bidders to pay by credit card.

14. We emphasize that the auction process is an evolving program and, therefore, the proposed fees are subject to change. We will review the proposed fees annually by conducting additional market price surveys and will adjust the fees as appropriate as the Commission gains experience. See the OMB Circular, 58 Fed. Reg. 38142.

IV. PROCEDURAL MATTERS

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[6]See the OMB Circular at 58 Fed. Reg. 38145.

[7]Under some circumstances, the Commission might, in its discretion, collect the proposed auction fees directly.

A. Comment Period and Procedures

15. Pursuant to the procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before May 31, 1995, and reply comments on or before June 5, 1995. All relevant comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting materials. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Interested parties who do not wish to participate formally in this proceeding may file informal comments at the same address. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 230) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554.

B. Ex Parte Rules

16. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed pursuant to the Commission's rules. See Sections 1.1202, 1.1203, and 1026 of the Commission's rules, 47 C.F.R. §§ 1.1202, 1.1203, and 1026(a).

C. Initial Regulatory Flexibility Analysis

17. As required by Section 603 of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1165, 5 U.S.C. § 601, et seq. (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested with respect to the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the Notice, but they must have a separate and distinct heading, designating the comments as responses to the IRFA. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

D. Authority and Further Information

18. Authority for this proceeding is contained in Sections 4(i) and (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and 303(r), as well as the Independent Offices Appropriation Act of 1952, as amended, 31 U.S.C. § 9701.

19. Further information about this proceeding may be obtained by contacting Bert Weintraub, at (202) 418-1316.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding the Commission's proposal to establish and collect fees for FCC proprietary remote software packages, on-line communications service charges, and bidder's information packages in connection with auctionable services.

Objectives

The Commission seeks to collect the necessary amounts through its proposed fees, with the funds going to the U.S. Treasury.

Legal Basis

The proposed action is authorized under Sections (4)(i) and (j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and 303(r), as well as the Independent Offices Appropriation Act of 1952, as amended, 31 U.S.C. § 9701.

Reporting, Recordkeeping and other Compliance Requirements

None.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule

None.

Description, Potential Impact, and Number of Small Entities Involved

The proposed fees may affect any auction bidder or interested party. These fees otherwise would be paid to an auction contractor to cover its own costs for providing similar services. Because the Commission will provide services directly to bidders, the Commission's proposal would recover the Government's costs from any bidders utilizing Commission-provided services. After evaluating the comments in this proceeding, the Commission will further examine the impact of any fee revisions or additions or rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Notice solicits comments on alternative methods of collecting the proposed fees.

APPENDIX B

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 1 -- Practice and Procedure

1. The authority citation continues to read as follows:

Authority: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Sections 1.1181 and 1.1182 are added to Subpart G to read as follows:

§ 1.1181 Authority to prescribe and collect fees for competitive bidding procedures.

Authority to prescribe, impose, and collect fees for expenses incurred by the Government is contained in the Independent Offices Appropriation Act of 1952, as amended, 31 U.S.C. § 9701, which authorizes agencies to prescribe regulations that establish charges for Government services and things of value for products and services provided by the Commission.

§ 1.1182 Schedule of fees for products and services provided by the Commission in connection with competitive bidding procedures.

Product or Service	Fee Amount	Payment Procedure
900 Telephone Service	$4.00 per minute	Payment of user's telephone bill
Remote Access Bidding Software	$200.00 per package	Payment to auctions contractor
Bidder's Information Package	First package free; $16.00 per additional package, including postage, to same person or entity	Payment to auctions contractor

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 95-231

In the Matter of Amendment of Parts 21, 43, 74,)		
78, and 94 of the Commission's Rules Governing)		
Use of the Frequencies in the 2.1 and 2.5 GHz)		
Bands Affecting: Private Operational-Fixed)	Gen. Docket No. 90-54	
Microwave Service, Multipoint Distribution)	Gen. Docket No. 80-113	
Service, Multichannel Multipoint Distribution)		
Service, Instructional Television Fixed Service,)		
& Cable Television Relay Service)		

Second Order on Reconsideration

Adopted: June 15, 1995 Released: June 21, 1995

By the Commission:

TABLE OF CONTENTS

		Para.
I.	Introduction	1
II.	Protected Service Area	2
	A. Background	2
	B. Petition	4
	C. Discussion	7
	D. Transition	20
III.	ITFS Notice	32
	A. Background	32
	B. Petition	33
	C. Opposition	35
	D. Reply	36
	E. Discussion	39
IV.	Frequency Offset Interference Protection Standards	45
	A. Background	45
	B. Petition	47
	C. Discussion	48
V.	Cut-Off Rule Clarification	54
VI.	Final Regulatory Flexibility Analysis	60
VII.	Ordering Clauses	68

APPENDIX A -- Rules

I. INTRODUCTION

1. We take the opportunity provided by a petition for partial further reconsideration filed by The Wireless Cable Association, Inc. (the Association),[1] to revisit three issues considered in the previous reconsideration order in this proceeding.[2] We find that sufficient justification has been provided to revise the definition of protected service areas of Multipoint Distribution Service (MDS) stations,[3] and in this order we expand the protected service areas of MDS operations from 710 square miles (which is the area of a circle 15 miles in radius) to approximately 3848 square miles (or a circle with a radius of 35 miles). We also reduce the periods for service of interference analyses on authorized Instructional Television Fixed Service (ITFS) stations and for filing ITFS petitions to deny; we clarify provisions regarding the demonstrations required for transmitter frequency offset when proposed in an MDS application as an interference abatement technique.

II. PROTECTED SERVICE AREA

2. Background. On April 26, 1984, the Commission adopted Section 21.902(d), defining a protected service area for each MDS station. 47 C.F.R. § 21.902(d). The protected service area represents the geographic demarcation of the area within which a particular MDS station is protected against harmful interference from other stations. *Amendment of Parts 21, 74 and 94 of the Commission Rules and Regulations with regard to the technical requirements applicable to the Multipoint Distribution Service, the Instructional Television Fixed Service and the Private Operational-Fixed Microwave Service (OFS)*, 98 FCC 2d 68 (1984) (hereinafter cited as *MDS Technical Rules Order*). Section 21.902(d) provides as follows:

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[1]The Association subsequently changed its name to The Wireless Cable Association International, Inc. Crowell & Moring filed an opposition, to one issue raised in the further reconsideration request, on behalf of four Instructional Television Fixed Service (ITFS) licensees, to which the Association filed a reply.

[2] On October 11, 1990, the first *Report and Order* in the above-captioned combined proceeding was adopted. *Report and Order, Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service*, 5 FCC Rcd 6410 (1990) (hereinafter cited as *Wireless Cable Order*). On September 26, 1991, we adopted an order on reconsideration of the *Wireless Cable Order*. *Order on Reconsideration, id.*, 6 FCC Rcd 6764 (1991) (hereinafter cited as *First Reconsideration Order*). The *Second Report and Order*, 6 FCC Rcd 6792 (1991), in this proceeding was adopted on September 26, 1991 also. The reconsideration order of the *Second Report and Order* is found at 7 FCC Rcd 5648 (1992).

[3] The Multipoint Distribution Service (MDS) includes both single-channel Multipoint Distribution Service stations and Multichannel Multipoint Distribution Service (MMDS) stations.

Subject to the limitations contained in (e) of this section each MDS licensee shall be protected from harmful electrical interference as determined by the theoretical calculations within an area described as follows:

(1) For a station using a transmitting antenna with an omnidirectional horizontal plane radiation pattern the boundary of the protected service area will be 24.1 kilometers (15 miles) from the transmitter site.

(2) For a station using a transmitting antenna with a non-omnidirectional horizontal plane radiation pattern the boundary of the protected service area will be the locus of all points located at distances from the transmitter as determined by the following equation:

$$D_b = \frac{D_{bmax}}{antilog \frac{(G_{max}-G)}{20}}$$

in which the parameters are defined as follows:

D_b = the distance from the transmitter site to the boundary in direction of interest;

G = the transmitter antenna gain in the direction of interest;

G_{max} = the maximum antenna gain;

D_{bmax} = the distance to boundary, in the direction of maximum gain that will make the total area of the protected service area equal to or less than 1838 square kilometers (710 square miles); all distances are in kilometers (miles), the gains are in dB relative to an isotropic antenna, and the antilog is taken to the base 10;

(3) Except that when the electrical horizon determined using the transmitting antenna height, a 30 foot receiving antenna height, and assuming 4/3 earth radius propagation conditions, is closer to the transmitter than boundary described in paragraph (d)(1) or (2) of this section, the electrical horizon shall be the boundary of the protected service area.

3. On February 8, 1990, we adopted a *Notice of Proposed Rule Making and Notice of Inquiry*, 5 FCC Rcd 971 (1990)(hereinafter cited as *Notice*). This *Notice*, among other things, requested public comment as to whether the MDS station's protected service area definition should be revised. *Id.* at 976-77. However, no revision of the definition was made in the *Wireless Cable Order*, 5 FCC Rcd at 6419-20. And several requests to expand the MDS station's protected service area made in the first set of reconsideration petitions filed in this proceeding were rejected. *First Reconsideration Order*, *id.*, 6 FCC Rcd at 6765.

4. Petition. In its petition for reconsideration, the Association describes the current 710 square mile definition of an MDS station's protected service area as "a ticking time-bomb set to explode in the wireless industry's future." Petition at 2. In a survey of its membership, the trade association ascertained that the majority of subscribers are located more than 15 miles from the transmitter (more than 50% of the current subscribers of 59% of the wireless cable systems surveyed). *Id.* at 5.[4] After acknowledging that the freeze on filing applications for new MDS stations currently protects wireless cable operators, it is asserted that "a field day for the unscrupulous" will be created once the freeze is lifted. *Id.* at 3, n. 6. If the current 710 square mile definition is still in effect at that time, wireless cable operators would have to choose between accepting harmful interference or buying out licensees of closely spaced stations. *Id.* at 3. "The net result is economic blackmail. The legitimate wireless cable operator must reach an accommodation if it is to have sufficient channel capacity to provide a viable service." *Id.* at 3, n. 6. In addition, service could not be provided to subscribers in the areas where harmful interference would be created by the closely spaced stations. *Id.* at 3. The Association asserts that interference between closely spaced stations threatens the very economic base on which the wireless cable industry is being built. *Id.* at 2. According to the Association, the ability of the wireless cable industry to offer the public a viable alternative to cable television service, and thus, compete with cable television systems will be enhanced by expansion of the MDS stations' protected service area. *Id.* at 13.

5. The Association also argues that "dramatic" technological innovations in reception equipment as compared to technology existing in 1980 justify an expansion of the MDS station's protected service area. "[D]ownconverters now introduce far less noise than they did in 1980. Moreover, inexpensive signal preamplifiers have been developed for installation at receive sites. . . . [F]ar less signal is necessary at the antenna input to produce an acceptable picture." *Id.* at 4. Because there has been a significant increase in the geographic area in which reliable service can be provided by MDS stations, it is asserted that there should be a corresponding increase in the size of the protected service area. *Id.* The

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[4] A "wireless cable" system uses a combination of Multipoint Distribution Service (MDS) 1, 2, E, F or H channels, or Instructional Television Fixed Service (ITFS) excess capacity to distribute video entertainment programming to subscribers. (MDS Channel 2A with only 4 MHz lacks sufficient bandwidth to transmit a standard television signal which requires 6 MHz.) It is possible for commercial companies to apply for a limited number of ITFS channels under prescribed circumstances. *Second Report and Order, id.*, 6 FCC Rcd 6792, 6801-06(1991). We do not restate the background of the term "wireless cable" here; interested parties may consult the *Wireless Cable Order*, 5 FCC Rcd at 6410. Use of the term "wireless cable" does not imply that MDS, ITFS or wireless cable constitute "cable" service for any statutory or regulatory purpose. *See Definition of a Cable Television System*, 5 FCC Rcd 7638, 7639-41 (1990)(the definition of a cable television system does not include transmissions such as MDS), *vacated on other grounds sub nom. Beach Communications, Inc. v. FCC*, 965 F.2d 1103 (D.C. Cir. 1992), *rev'd*, 113 S.Ct. 2096 (1993).

Association makes careful note in its reply that "*no one has opposed [the Association's] Petition to the extent it requests refinements in the way protected service areas are calculated under Section 21.902(d) of the Rules.*" (emphasis in original).

6. And finally in its reconsideration petition, the Association argues that it would "jeopardize the viability of wireless cable" if we attempt "to cram more stations into the band than the laws of physics allow." *Id.* at 13-14. The petition warns that "[t]he Commission should learn from the mistakes that have so badly crippled the AM service." *Id.* Quoting Commission language in *Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6373, 6374-75 (1991), the Association emphasizes that "[a]dopting the rule revisions proposed by [the Association] will spare the wireless cable industry that [AM channel congestion and interference] future." *Id.* at 13-14.

7. Discussion. We agree with the Association that changed circumstances, including recent technological developments and the existing scope of MDS customer locations, warrant a change in the MDS protected service area definition.

8. A stated goal for this proceeding was to revise the MDS technical rules to maximize the service capabilities of MDS operators. *Notice*, 5 FCC Rcd at 971, 972. In the *Wireless Cable Order*, we reiterated that one goal of the proceeding is to "enhance the viability of wireless cable service and its stature as a competitive force in the multichannel video delivery marketplace." 5 FCC Rcd at 6411. We continue to believe that MDS holds the potential to function as a competitive spur to coaxial cable system operators. *Notice*, 5 FCC Rcd at 971. And, as we previously stated, "[a]t this time, wireless cable service is one of the most imminent sources of such competition." *Wireless Cable Order*, 5 FCC Rcd at 6417. We now believe that an expansion of the protected service area of MDS stations is the best way to serve these objectives.

9. Expanding protected service areas to more closely reflect actual service areas should strengthen the viability of authorized MDS stations by ensuring more of their customers are protected against harmful interference from other stations. As a result, the service should be more attractive to customers. An expansion of the MDS station's protected service area will promote other public interest benefits. For example, strengthening MDS stations' viability will contribute to the national economy overall. We expect our action to increase economic growth and create new jobs. We also expect the expansion of the MDS station's protected service area to enhance consumer access to the video entertainment programming market. Finally, wireless cable system operators often lease excess capacity from ITFS licensees. As part of these arrangements, MDS operators often furnish improved video capabilities to the ITFS licensee. We believe strengthening MDS operators will have important secondary benefits for ITFS licensees, and better enable them to meet their educational service objectives. *See Wireless Cable Order*, 5 FCC Rcd at 6411 ("[T]hese changes will enhance ITFS by improving service quality and potentially increasing the revenues received by ITFS entities through the leasing of excess capacity.")

10. In addition, since the filing of the Association's second reconsideration petition in this proceeding, there have been two developments at the Commission which are relevant to our revision of the MDS station protected service area definition. First, in the February 7, 1995 *Report and Order* in MM Docket No. 93-24, the Commission established a fixed 35-mile distance as one of several criterion for ITFS receive site interference protection. *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 10 FCC Rcd 2907, 2917 (1995). This is significant in considering the MDS station's protection. As the *Notice* for the *Wireless Cable Order* states, one of the purposes of this particular rulemaking proceeding was to make the rules for ITFS and MDS as compatible as practical within the context of the separate origination, purposes and historical development of the two sets of rules. *Notice*, 5 FCC Rcd at 971 ("to ... simplify, where possible, the host of disparate technical . . . requirements . . . applicable to MDS operators, with a view to facilitating this service." *Id.*). The adoption of a protected service area definition for MDS stations which uses a uniform 35-mile criterion would serve this goal by reconciling one MDS rule with its ITFS rule counterpart and by enhancing the compatibility for the wireless cable operator who uses ITFS and MDS channels, by lease or license, from the same transmitter site.

11. The second relevant rulemaking determination, after the Association's second reconsideration petition was filed, was our adoption of a *Notice of Proposed Rulemaking* in MM Docket No. 94-131, 9 FCC Rcd 7665 (1994), on November 10, 1994, which included competitive bidding procedures for initial applications for new MDS stations. In view of the competitive bidding procedures we are adopting today in the *Report and Order* in MM Docket No. 94-131, we have decided that it is even more important that an MDS station's protected service area boundary "be easy to use and understand so that the spectrum use rights of licensees be clear." *MDS Technical Rules Order*, 98 FCC 2d at 105.

12. In this context, we gave careful consideration to the Association's proposal that the protected service area boundary not be a uniform circle for MDS stations which use a non-omnidirectional antenna. This boundary proposed by the Association is a collection of calculated points, from 7.2 miles to 44 miles from the station transmitter site, for an MDS station using a non-omnidirectional antenna. Calculations must be made of the equivalent isotopically radiated power (EIRP) along each radial from the transmitter, at one degree intervals, for all 360 degrees of the protected service area boundary. However, this irregular and difficult to predict service area approach would be incompatible with the competitive bidding process adopted today in MM Docket No. 94-131. A protected service area definition which is a uniform circle with a radius of 35 miles will have several prospective benefits for the wireless cable operator after competitive bidding procedures are implemented.

13. For MDS stations with an omnidirectional transmitting antenna, the Association proposes circular protection zones with varying radii depending on the EIRP of the particular station involved. The Association provides a table to show the range of boundary distances it proposes, from 7.2 miles at 1.00 watt EIRP, to 32.5 miles at 1995.27 watts EIRP, to 44 miles for 7943.3 watts EIRP. Because Section 21.904(a) limits the

maximum EIRP for an MDS station using an omnidirectional antenna to 2000 watts, frequently the protected service area boundary proposed by the Association would be about 33 miles because the station would be authorized at 2000 watts EIRP.[5]

14. The need for a uniform fixed circle boundary is premised partially upon the ability of authorized MDS stations who are not competitive bidding winners to make modifications in their station design and location without getting the permission from the competitive bidding winners, who would be authorized for the area immediately adjacent to the 35-mile circle. Under the irregular boundary proposal, the orientation of the non-omnidirectional transmitting antennas would be crucial in the calculation of the boundary. It has been our experience with MDS stations over the last twenty years that the orientation is sometimes modified, with a corresponding change in the boundary of the MDS station's protected service area. In addition, MDS stations sometimes change from a non-omnidirectional to an omnidirectional antenna, again changing the boundary of the station's protected service area. MDS operators also increase a station's EIRP, which under the Association's proposal would expand the protected service area. Under our protected service area definition, the effective service area could be expanded to a distance of 35 miles from the transmitter site without a need to secure the consent of competitive bidding winners of immediately-adjacent areas. Thus, in terms of modifications made after any relevant competitive bidding, authorized in the *Report and Order* in MM Docket No. 94-131 adopted today, both omnidirectional and non-omnidirectional stations will benefit substantially from the flexibility afforded by a fixed mileage protected service area definition. Participants in competitive bidding for areas adjacent to a particular MDS station's protected service area would benefit as well from this clearly delineated, objective and consistent fixed mileage distance boundary.

15. Reflecting Commission experience with the disputes and application processing disruption that arise when a fixed mileage boundary is not used, the petition of the Association cautions that reasonable engineers using the current definition of Section 21.902(d) have frequently disagreed over the determination of protected service area boundaries for non-omnidirectional systems, resulting in unnecessary disputes. Petition at 11. After competitive bidding procedures are implemented, under the Association's proposal, there is a possibility that service would be delayed due to disputes between competitive bidding winners and authorized or previously proposed MDS stations as to the boundaries of a protected service area of an MDS station using a non-omnidirectional antenna. Thus, the adoption of the same definition for MDS stations which use a non-omnidirectional antenna would help to clarify the rights of applicants, conditional licensees and licensees of the previously-proposed and authorized stations and eliminate the inefficiency and disruption produced by disputes during and after application processing.

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[5] Section 21.904 allows authorization of power levels above 2000 watts EIRP only when the MDS station uses a non-omnidirectional antenna.

16. We note that 35 miles is a slightly greater distance than the 33 miles proposed by the Association for an omnidirectional antenna with the maximum authorized EIRP. To that extent, the Commission is providing a larger protected service area than requested by the petitioners herein. For MDS stations which use a non-omnidirectional antenna, we have done our own calculations.[6] In nearly all instances, the current 710 square mile protected service area of MDS stations using non-omnidirectional antenna, even at the farthest boundary point, will fit completely within the expanded 3848 square mile protected service area. Also, MDS stations using a non-omnidirectional antenna will be able, pursuant to the provisions of 47 C.F.R. § 21.913, to provide service to subscribers within the 35-mile circle using signal boosters when a signal cannot be received from the main transmitter.

17. With regard to the Association's proposal that MDS stations with a power level less than 2000 watts EIRP receive corresponding smaller protected service areas, as a means to deter speculators and restrain "economic blackmail" of authorized or previously-proposed stations, we have determined that a better approach to curb such abuses of our rules and procedures is: (1) more rigorous scrutiny of initial MDS applications for compliance with our technical processing requirements and interference protection rules, and (2) fewer grants of construction extension applications for both ITFS and MDS stations by stricter application of the previously-adopted standards. This should diminish the number of such initial applications filed by speculators which would be granted or eliminate the "economic blackmail" opportunity at the end of the first construction period.

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[6] For example, an MDS station using a Bogner B8SC (C pattern) transmitting antenna using the current protected service area definition (a 710 square mile area) has a boundary which is approximately 31.89 miles from the transmitter site at the farthest point. A similar calculation of the protected service area pursuant to the current provisions of Section 21.902(d) for an MDS station using an Andrew HMD12VC (Vertically Polarized Cardioid) or an Andrew HMD12HC (Horizontally Polarized Cardioid) transmitting antenna shows that the farthest boundary point from the transmitter would be approximately 21.25 miles. A non-omnidirectional transmitting antenna which is more frequently proposed for MDS stations than the first two listed is the Bogner B16SA (A pattern) which gives a boundary at the farthest point approximately 19.23 miles from the transmitter, using the current protected service area definition of a 710 square mile area. Sometimes a Bogner B pattern transmitting antenna is proposed, such as, a Bogner B8SB, which provides a border, at the farthest point, of approximately 24.1 miles, under the current 710 square mile definition. These are the four non-omnidirectional transmitting antennas very often used in MDS applications over the last five years. Our calculations show that each of these specified transmitting antennas produces a 710 square mile protected service area with a farthest point which is less than 35 miles from the MDS transmitter. However, we have found one MDS station in the past that used a Bogner B8SD transmitting antenna, which provided a border at the farthest point of approximately 42.52 miles, using the current 710 square mile protected service area definition for stations using a non-omnidirectional antenna.

18. We have considered all of the arguments advanced in the Association's petition and reply, and have analyzed the public interest benefits that should flow from an expansion of the MDS station's protected service area. We have also weighed the efficiencies and benefits to the public of prompt initiation of new MDS systems which would result from adoption of a definition using a uniform, fixed mileage boundary for the protected service area of MDS stations. In defining the protected service area boundary as a fixed distance from the transmitter, the Commission specifically stated "that there is a need to establish a protected service area boundary that is easy to use and understand so that the spectrum use rights of licensees are clear. Unlike calculated and measured contours, a fixed mileage boundary is easy to use and understand." *MDS Technical Rules Order*, 98 FCC 2d at 105-06.

19. In order to simplify MDS rules and promote the development of MDS stations as effective competitors to cable television systems, we adopt a uniform 35-mile boundary for the protected service area of each MDS station. The MDS station's protected service area increases from 710 square miles to approximately 3848 square miles. Because it could preclude the authorization of a closely spaced analog station for which a lack of harmful interference must be demonstrated in a subsequently-filed modification application as a condition precedent to installation of a digital transmitter in a previously-authorized MDS station, this expanded protected service area definition will best allow the transition from analog transmitters to digital compression technology, a transition now beginning to occur. Manufacturers have been developing appropriate MDS equipment. A number of experimental licenses have been issued for MDS stations during the last four years for the use of such digital compression technology. We also expect that the adoption of this expanded, fixed mileage definition will best conserve scarce Commission resources for the efficient processing of MDS applications and will help preserve the rights of previously-proposed and authorized MDS stations after competitive bidding.

20. Transition. With regard to the issue of transition from one definition to an expanded definition of an MDS station's protected service area, the Association states, "[w]hile transitional concerns must certainly be addressed, none is so thorny as to justify denying the public of the benefits that will accrue by affording wireless cable operators an appropriate" protected service area. Petition at 16.

21. The Association proposes a transition approach that would limit the use of the new protected service area definition to applications filed after the effective date of the new rule. *Id.* at 14. We have decided to adopt the proposal of the Association. Applications filed on or after the effective date of the revision to Section 21.902(d), including applications filed by competitive bidding winners, must base interference analyses on the protected service area definition of a circle with a radius of 35 miles, except as provided below. On the other hand, interference analyses for applications filed before the effective date must be based on the current protected service area definition of 710 square miles.

22. In order to protect the ability of applicants and licensees grandfathered under the old rules to amend their applications or modify their licenses, the Association proposes

that an MDS station's protected service area would be reduced below a circle with a radius of 35 miles in prescribed circumstances. According to this proposal, interference analyses submitted in application amendments or modification applications could exclude from the protected service area any area where a desired station must accept harmful interference from any other station pursuant to the interference protection priorities of Section 21.902(e). It is claimed that this reduction of the MDS station's protected service area would allow cochannel licensees to take steps to reduce but not necessarily eliminate harmful interference. Petition at 14-16.

23. We are not persuaded that this proposal draws a sufficient demarcation of the rights of licensees, conditional licensees and applicants with previously authorized or proposed MDS stations, and may be incompatible in circumstances in which competitive bidding would occur. In this context, we note that one of the underlying purposes for this expansion of the geographic interference protection zone for authorized and previously-proposed MDS stations is to protect such stations. For example, we do not believe reducing the protected service area boundary to a distance of less than 35 miles from the coordinates of a desired station, authorized or with an application pending on the effective date of the expanded protected service area rule would serve the public interest. We are still interested in providing incentives for the affected parties to create station configuration solutions, which have repeatedly been used by MDS stations in the past. Therefore, the requested revision will not be made.

24. However, we are adopting a very limited exception to the 35-mile circle protected service area definition. The exception applies only to: (1) modification applications filed after the effective date of the expansion to a 35-mile circle protected service area; (2) MDS stations which were authorized or for which there was an application pending on or before the effective date of this expanded protected service area rule; and (3) the interference analysis of the protected service area of an MDS station which was authorized or for which there was an application pending on or before the effective date of the revision to Section 21.902(d).

25. The exception to the 35-mile circle protected service area allows such a modification application's interference analysis to exclude from the desired station's 35-mile circular protected service area the area defined by the intersection of the predicted 45 dB desired to undesired signal ratio contour line associated with the modification applicant's previously authorized station and the 35 mile circle boundary of the desired station. However, the modification application: (1) cannot increase the size of the geographic area suffering harmful interference, and (2) cannot cause harmful interference to any new portion of the other station's protected service area.[7] The exception also does not apply to

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[7] A comparison will be made with the 45 dB desired-to-undesired signal ratio contour line associated with the applicant's station proposed in its modification application. Thus, we will compare the area in which interference is predicted pursuant to the previously authorized undesired station to the area in which interference is predicted pursuant to the undesired station's proposal in the modification application.

any point within the desired station's current 710 square mile protected service area. No modification will be allowed which would cause existing stations to adapt to additional interference. We emphasize that the limited exception adopted herein applies only to the 45 dB desired to undesired signal ratio contour line created by the signals of the desired station in the one interference analysis and the specified modifying applicant's station *as to each other*. In the alternative, a modification applicant may file a consent statement pursuant to a voluntary agreement. We expect that many accommodations will be made through voluntary agreements. This limited exception is similar, but not identical, to the approach adopted in the text of the *MDS Technical Rules Order*, in 1984 when the Commission changed from the previous scheme of calculation of signal strength contours and adopted the current 710 square mile definition of a protected service area, with regard to MDS stations authorized before 1984. *MDS Technical Rules Order*, 98 FCC 2d at 111-13. Moreover, we will consider waiver requests made in MDS modification applications filed for ITFS market settlements after the effective date of the expanded protected service area rule.

26. In addition to compliance with the current requirements of §§ 21.902(a) - (c), each modification application for an authorized MDS station filed after the effective date of the expanded protected service area rule, which requests a waiver of the expanded protected service area definition of Section 21.902(d), must contain: (1) a waiver request and waiver justification pursuant to 47 C.F.R. § 21.19, and (2) a map, 8 1/2 by 11 inches, depicting the boundary of the 45 dB desired to undesired signal ratio contour, which clearly states the mileage at each radial, measured at one degree intervals, for 360 degrees, of the protected service area boundary from the desired station's transmitter site coordinates.

27. We do not expect that the adoption of this expanded definition of the protected service area for MDS stations will preclude the filing of applications proposing new MDS stations in nearby areas, which might cause harmful interference to the expanded 3848 square mile protected service area, but would not have caused harmful interference to the currently defined 710 square mile protected service area. There are a number of engineering techniques which can be used, singularly or in combination, to avoid or eliminate the potential for harmful interference. Examples of such techniques include cross-polarization, receive site shielding, change in antenna height, increase or decrease of transmitter power, substitution of more modern receiving antenna, installation of a filter on receiving antenna, use of a transmitter with high stability local oscillators which allow frequency offset, change of directional antenna azimuth, change of the transmitting antenna design, change of the radiation pattern of the transmitting antenna, transmitting antenna beam tilt change, or increase transmission line losses. In the alternative, an MDS applicant might decide to propose a different transmitter site to avoid causing harmful interference to the protected service area of an authorized or previously-proposed MDS station.

28. We anticipate that these methods would be instrumental in resolving situations of potential harmful interference that may be caused by new MDS operations. If such techniques and alternatives fail to resolve potential interference problems, the parties may negotiate and reach a mutually-satisfactory accommodation. Indeed, the parties are required by Section 21.902(a) to cooperate fully and in good faith in attempting to resolve problems of potential harmful interference.

29. In order to ease the transition from the current definition of an MDS's protected service area to the new 35-mile boundary definition, we announce that the expanded protected service area rule will become effective 60 days after publication of a summary of this order in the *Federal Register*. Unless the exceptions described at paragraphs 24 and 25 *supra* apply, any modification applications or applications for new MDS stations filed after that effective date must use the definition of a protected service area as revised herein, including the winners of competitive bidding procedures.

30. One issue that is raised by the expansion of an MDS station's protected service area is the extent to which such expansion would impact compliance with the statutory and regulatory cable-MDS ownership and leasing prohibitions of 47 U.S.C. § 553(a)(2) and 47 C.F.R. § 21.912. Pursuant to the prohibition against cable ownership or leasing of MDS stations embodied in 47 C.F.R. § 21.912, a cable television system operator may not hold a cognizable interest, directly or indirectly, in any MDS station if the MDS station's protected service area overlaps the cable television system's service area. Therefore, expansion of the protected service area adopted herein may cause cable leasing arrangements and common ownership of cable systems and MDS stations, formerly in compliance with Section 21.912, to fall now within the prohibitions of the rule. Based on our experience with the implementation of Section 21.912 since 1990, we anticipate few instances would occur. To the extent that there will be further restriction on the ability of cable television systems to own or lease, directly or indirectly, MDS stations in the same geographic area, we find that the further restriction implements the underlying purpose of Section 21.912, namely to enhance competition by a microwave provider of multichannel video entertainment programming as an alternative for consumers to cable television systems in the same area.

31. We hereby grant today temporary waivers of 47 C.F.R. § 21.912 for prohibited overlaps that are a direct result of the expansion of the protected service area for MDS stations, but which did not exist under the current 710 square mile protected service area definition. These temporary waivers end June 1, 1996. A temporary waiver for a particular MDS station will continue until final action is taken on the waiver request for any MDS station for which there has been filed a waiver request pursuant to the special relief procedures specified at 47 C.F.R. § 76.7 on or before June 1, 1996. We are providing such a lengthy period for waiver or divestment to avoid creating immediate capital flow problems for wireless cable operators and potential injury to the wireless cable industry. The waiver requests filed on or before June 1, 1996 should provide us with necessary information to measure the extent of any prohibited ownership or leasing arrangements newly-created by our adoption of a revised protected service area definition.

III. ITFS NOTICE

32. Background. Under the rule provisions adopted in the *First Reconsideration Order*, MDS applicants proposing stations on the E, F or H channels do not serve cochannel or adjacent channel ITFS stations until 60 days after the Commission issues a public notice of

the MDS station application.[8] Thereafter, there is a separate 60 day period of time for the filing of an ITFS petition to deny.[9] *See* 5 FCC Rcd at 6413.

33. Petition. The Association argues in its reconsideration petition that, in order to avoid unnecessary delay in processing MDS applications, the Commission should revise its rules concerning deadlines for ITFS service and petitions to deny. The Association complains that "the rules adopted in the *Reconsideration Order* . . . effectively delay for a minimum of six months the granting of even the most benign MDS application," and "afford ITFS entities far more protection than is necessary." Reply at 8. "[T]he adverse impact of these new rules on those attempting to develop wireless cable systems is patent." Petition at 17.

34. A special case is made with regard to modification applications. Because it is "a virtual impossibility" for a modification application for an MDS station to be mutually-exclusive with any other application, "an applicant for a MDS license modification should be permitted to serve its interference studies on ITFS interests prior to filing its application and that those ITFS interests should be required to file any petitions to deny" of the MDS modification application at an earlier date. *Id.* at 18-19. "Such an approach will expedite the processing of MDS modification applications by reducing the time before an application is ripe for grant, without having any adverse effect on the ITFS community." *Id.* at 19.

35. Opposition. The Crowell & Moring opposition is limited to this one issue, the deadlines for ITFS service and petitions to deny. According to this opposition, the rule adopted on October 10, 1990 in the *Wireless Cable Order* created administrative and financial hardships for ITFS licensees. From October 10, 1990 through December 29, 1991, ITFS stations were required to review and potentially filed petitions to deny for interference analyses for dozens of applications proposing identical station designs at the

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[8] For MDS modification and non-mutually exclusive new station applications, this is the public notice announcing that the application has been accepted for filing. For MDS mutually-exclusive new station applications, this is the public notice announcing that the application has been selected in a lottery for qualification review.

[9] Of course some ITFS entities elect not to oppose a cochannel or adjacent channel MDS station's operation and have cooperated in resolving potential interference conflicts with MDS stations. As planned by the Commission in 1983, such ITFS stations have benefited from the symbiotic relationship that has been created by receiving "better and more efficient communication facilities at no expense," the "technical expertise of the commercial users of the band," and "reasonable compensation for any dislocations caused by the operation of [MMDS] facilities." *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1238, 1248 (1983); *see MMDS Allocation Order on Reconsideration, id.*, 98 FCC 2d 129, 135 (1984).

same location. Opposition at 3-4. "Furthermore, ITFS stations were required to review and analyze even those interference studies which accompanied MMDS applications which were unacceptable for filing or applications that would lose in the lottery, creating unnecessary work for ITFS licensees. . . ." *Id.* at 6. "Reviewing numerous MMDS applications and attempting to fund numerous petitions to deny, instead of a single one as the rules in the *Order on Reconsideration* prudently decided, strips educational organizations of resources which could be better directed toward the critically important goal of educating American citizens." *Id.* at 8. However, in the *Order on Reconsideration*, the Commission modified that procedure. *Id.* at 2. "The new rule decreases the costs and administrative burdens on ITFS licensees." *Id.* at 5. The opposition of Crowell & Moring also complains that the requisite rule requires service only of the ITFS interference analysis, not the entire MDS application. *Id.* at 4.

36. Reply. The Association agrees with Crowell & Moring that ITFS service provisions should be revised to require the service of complete applications, not just interference studies. Reply at 2. "Unfortunately, some applicants . . . recently have been serving interference studies that fail to provide sufficient information for the recipient to duplicate the analysis or to file an appropriate petition to deny. . . . [T]he newcomer is wrongly imposing an unnecessary burden on MDS and ITFS licensees and prior applicants." *Id.*

37. However, the Association opposes the delay in MDS application processing caused by retention of the 60 day deadline for ITFS service and a second 60 day deadline for filing an ITFS petition to deny, for a total period of 120 days *after public notice*, adopted in the *First Reconsideration Order*. "[T]he Commission should bear in mind that when the processing of MDS applications is unreasonably delayed, the introduction of new educational telecommunications services into the community is also delayed." Reply at 3. The Association describes the Private Radio Bureau's practice of placing H channel applications on public notice as accepted for filing and providing potentially affected ITFS entities thirty days to file a petition to deny.

> Even today, applicants for most modifications to ITFS stations need not serve potentially affected cochannel or adjacent channel ITFS entities. Rather, the Mass Media Bureau publishes public notice that such an ITFS application has been accepted for filing and potentially affected ITFS entities have thirty days to secure a copy of the application, analyze it and prepare a petition to deny. *There is no evidence in record that any ITFS entity has ever been adversely impacted by Commission requirements forcing them to secure applications on their own and then file petitions to deny within 30 days after public notice!*

Reply at 5 (emphasis in original).[10] In its reply, the Association proposes a scheme that is different from the proposal the Association made in its reconsideration petition, requiring service for authorized cochannel and adjacent-channel ITFS stations by certified mail prior to filing the MDS application with the Commission, together with submission of proof of receipt by the ITFS station at a later date. In turn, the ITFS petition to deny would be due thirty days after public notice of acceptance for filing of a non-mutually exclusive application or modification application or thirty days after public notice of selection for qualification review by lottery. "This will eliminate the problem Crowell & Moring cites -- the need to examine multiple mutually-exclusive applications -- without unduly delaying the processing of MDS applications." Reply at 5-6. "Particularly since ITFS entities have proven themselves able to protect their rights in 30 days even when they are not served with applications, the MDS application service requirement [the Association] proposes will assure that the ITFS entity has ample opportunity to analyze applications and submit post-lottery petitions to deny where necessary." Reply at 5-6.

38. The Association again makes a separate proposal for modification applications. "Returning to the approach adopted in the 1990 *Report and Order* with respect to at least modification applications will expedite the processing of MDS modification applications by reducing the time before an application is ripe for grant, without having any adverse effect on the ITFS community." Reply at 7. "[N]o analysis or petition to deny will be required until after the Commission gives public notice that the ... application has been accepted for filing." Reply at 7. "[B]ecause ITFS channels represent twenty of the thirty-[two] channels available for wireless cable use, wireless cable operators have every interest in assuring that they and their ITFS [lessors] have a full and fair opportunity to analyze applications proposing nearby stations and petition to deny if necessary. However, the rules adopted in the *Reconsideration Order*, which effectively delay for a minimum of six months the granting of even the most benign MDS application, afford ITFS entities far more protection than is necessary." Reply at 8.

39. Discussion. The existing delay between public notice and qualification review of MDS applications to accommodate ITFS service and the possible filing of an ITFS petition to deny, which frequently is not filed, conflicts with our goal that MDS stations become operational as soon as possible in order to provide competition for traditional cable television systems. We are interested in shortening this period when MDS applications proposing facilities which are cochannel or adjacent channel to authorized ITFS stations cannot be processed.

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[10] The Association urges in its Reply the adoption of a group of rules, proposed in December, 1991 by the Association, to bar settlements and to provide disincentives for the filing of multiple speculative applications. Reply at 4. Subsequent to the filing of its reconsideration petition, numerous such rule revisions were adopted by the Commission on January 14, 1993. *Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 8 FCC Rcd 1444 (1993).

40. In response to the objection of Crowell & Moring to filing an ITFS petition to deny against an MDS application which has not yet been accepted for filing and the Association's concern with the delay in processing MDS applications which are cochannel or adjacent-channel to ITFS stations, we have decided to adopt the last proposal made by the Association, with some changes. An MDS applicant filing an initial application for a new station or a modification application, on October 1, 1995, or thereafter, proposing a station transmitter site within 50 miles of a grandfathered cochannel or adjacent channel ITFS station's transmitter site, must serve, by certified mail, return receipt requested, a copy of the complete initial or modification application, including each required interference analysis or exhibit, on each ITFS licensee or construction permittee with an authorized transmitter site within 50 miles of the MDS station's proposed transmitter site no later than the day the initial or modification application is filed with the Commission. If the copy of the requisite MDS application is mailed after the date of filing of the MDS application, or if an incomplete copy of the MDS application is mailed to the ITFS licensee or construction permittee, or if the ITFS Service Notice is filed after the 30-day deadline, it will be treated as a defect in the MDS application. *See* 47 C.F.R. § 21.20(a)

41. Such MDS applicants will still be required to file an ITFS Service Notice, but now the deadline will be the 30th day after filing of the MDS application. The MDS application must include a certificate of service for the specified ITFS licensees and construction permittees stating that: (1) its complete application has been sent by certified mail, return receipt requested on or before the date of filing of the MDS application, (2) the date of mailing of the MDS application copy to the ITFS licensee or construction permittee, (3) the names of the ITFS licensees and construction permittees so served, and (4) the addresses of the ITFS entities so served. In this manner, at the time of review of any ITFS petition to deny, the MDS processing staff will have information as to what date each affected ITFS licensee or construction permittee received a copy of the complete MDS application.

42. In establishing deadlines for the rule provision concerning the ITFS interference protection duty of specified MDS entities, footnote 16 of the *Wireless Cable Order* segregated MDS applications into three categories based on the filing date of the MDS application: (1) applications filed prior to October 11, 1990; (2) applications filed from October 11, 1990 through January 24, 1991; and (3) applications filed after January 24, 1991 (subsequently this category's period was ended at December 29, 1991). The duties of such MDS applicants established in that order will continue after adoption of this order. In the *First Reconsideration Order*, a fourth category and set of duties for ITFS interference protection were established for specified MDS applications filed beginning on December 30, 1991 (by this order this category's period is ended September 30, 1995). The fourth category of duties was made applicable to H channel MDS applications in the *Second Report and Order*. Those duties established in that reconsideration order will continue after adoption of this order. We are today adding a fifth category: applications filed on October 1, 1995 and thereafter. This time we are beginning the period with the commencement of a fiscal year in order to speed the processing of MDS applications.

43. So that MDS applications can become ripe for grant more speedily and the initiation of MDS stations, providing new service to the public, can occur at an earlier date, we adopt a thirty day period for the filing of ITFS petitions to deny as requested in the Association's reply. This deadline is triggered still by the specified public notice of the MDS application, not the filing of the MDS application. If such an ITFS entity is not served prior to the date of the relevant public notice, we will ensure that the ITFS licensee or construction permittee is given 60 days from the date of actual receipt to file a petition to deny for the relevant cochannel or adjacent-channel MDS application.

44. ITFS petitions to deny will be due no later than the 30th day after public notice that: (1) the MDS modification application has been accepted for filing, (2) the initial application for a new MDS station appears to be non-mutually exclusive and is accepted for filing, (3) the initial application for a new MDS station has been selected for qualification review as the result of a random selection process (*See* 47 C.F.R. § 1.824(c)); or (4) the application for a new MDS station submitted by the winning bidder of a competitive bidding process has been accepted for filing.[11] Our rules are revised accordingly.

IV. FREQUENCY OFFSET INTERFERENCE PROTECTION STANDARDS

45. Background. Section 21.902(c)(1) currently requires the submission with MDS applications of an analysis of the potential for harmful interference to authorized and previously-proposed cochannel stations. Section 21.902(f) defines harmful interference for MDS cochannel stations which provide video signals as a desired-to-undesired signal ratio of less than 45 dB. In the *Wireless Cable Order*, new equipment performance standards were adopted for frequency offsets, "to reduce cochannel interference," and "to allow an increase in the number of stations in a geographic area."[12] *Wireless Cable Order*, 5 FCC Rcd at

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[11] The Commission is adopting today rules for the competitive bidding process for mutually-exclusive MDS applications in the *Report and Order* in MM Docket No. 94-131.

[12] In this regard, the order imposes a new duty on MDS licensees.

> We believe that the benefits of the transmitter tolerance standards adopted here will be greatly enhanced by the use of frequency offset in many cases. We will therefore require that all licensees with equipment conforming to the transmitter tolerance standard adopted here, including licensees upgraded by other operators, use frequency offset where it is demonstrated to be necessary to avoid harmful interference with another existing or previously proposed system.

Wireless Cable Order, 5 FCC Rcd at 6420. (emphasis added.)

6420.[13] However, neither Section 21.902(c)(1) nor Section 21.902(f) were revised in the *Wireless Cable Order*, to either eliminate the requirement to file a cochannel interference analysis or to substitute a 22 dB standard or a 28 dB standard for the 45 dB desired-to-undesired signal ratio enunciated at Section 21.902(f).

46. In the *First Reconsideration Order*, we did not adopt a separate desired-to-undesired signal ratio to define harmful interference for cochannel stations when a frequency offset technique is used. We agreed with the assessment of The Wireless Cable Association that there "is simply not yet enough technical information available . . . to merit that degree of confidence in the ability of any given frequency offset technique to avoid interference." *First Reconsideration Order*, 6 FCC Rcd at 6770. However, we did clarify in that order that the *Wireless Cable Order* did not eliminate the requirement to demonstrate a lack of harmful interference to cochannel stations and that it was insufficient just to file an analysis showing a 28 dB, instead of a 45 dB, desired-to-undesired signal ratio, unless there is a voluntary agreement between affected MDS stations to employ a frequency offset technique. *Id.*

47. Petition. While explaining that "frequency offset is an effective tool for eliminating interference that would otherwise exist" and recognizing that "precision offset yields an acceptable signal even where the predicted co-channel [desired-to-undesired ratio] is well below 45" dB, however, the Association asserts again in its second reconsideration petition that insufficient data has been generated to date to allow the adoption of either a 22 dB or a 28 dB desired-to-undesired signal ratio. Petition at 21-22. "[I]t is premature to adopt final standards without more experience." *Id.* at 22. Therefore, the Commission should "permit a newcomer an opportunity on an *ad hoc* basis to demonstrate that its particular proposal will yield the equivalent of 45 dB." *Id.* at 22. It is asserted that an *ad hoc* approach for approval of the use of frequency offset techniques would maximize the number of stations that can operate without causing harmful electrical interference to receive sites of other stations, while the duty would remain with the subsequently-filing applicant to demonstrate a lack of harmful interference. *Id.* at 23. The trade association expects that in time the Commission will be able to abandon an *ad hoc* approach and develop a specific desired-to-undesired signal ratio for use when frequency offset techniques are proposed. *Id.*

48. Discussion. We have continued to receive MDS applications which state that no interference analysis is filed for an authorized or previously-proposed cochannel station because the Commission should order the authorized or previously-proposed station to use a frequency offset transmitter. In addition, we have received MDS applications which state

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[13] Section 21.905(c) provides:

> Any licensee of a[n MDS] station . . . after notice and opportunity for hearing, may be required to use the frequency offset technique to avoid or to minimize harmful interference to another licensed [MDS] station . . . or to make other changes . . . .

that they are choosing a definition of harmful cochannel interference different than the desired-to-undesired signal ratio provided at Section 21.902(f), without any further discussion, demonstration, or justification, other than the fact that the Commission should order the authorized or previously-proposed station to use a frequency offset transmitter. We have never adopted such standards and we are not adopting such standards here.

49. It is not sufficient to merely file an analysis showing desired-to-undesired signal ratios of less than 45 dB, together with a statement that the authorized or previously-proposed station should be ordered by the Commission to install a frequency offset transmitter. More is required of MDS applicants. We note that, any subsequent-filing applicant that relies upon involuntary frequency offset transmitter upgrades of authorized or previously-proposed MDS stations as a method to meet interference protection standards for MDS stations, after the required notice and an administrative hearing, at a minimum, must demonstrate that it will install or has installed previously a frequency offset transmitter, in addition to meeting the other requirements of our rules. We emphasize that a statement alone, without the required analysis and demonstration that the equivalent of protection from harmful interference is provided by the applicant's proposal, is inadequate and does not comply with the requirements. Any MDS applications containing merely a statement and an interference analysis alone will not be accepted for filing in that form due to failure to comply with the requirements of Section 21.902(c)(1). *See* discussion of station design techniques and site selection at paragraph 27 *supra*.

50. Yet, we agree with the Association that MDS applicants should be allowed to make a request for waiver of the 45 dB standard only when the waiver request includes an additional demonstration to show that the location and configuration of the proposed MDS station will provide the equivalent of protection from harmful interference as the 45 dB desired-to-undesired signal ratio recognized at Section 21.902(f). Any lack of explicitness in our discussion in the *First Reconsideration Order* was an oversight. We hereby make the requested clarification.

51. We will assess demonstrations of a lack of harmful interference to authorized or previously-proposed cochannel MDS stations, on a case by case basis, when the subsequently-filing MDS application is proposing to use a frequency offset transmitter or when the authorized or previously-proposed MDS station already is authorized or proposes to use a frequency offset transmitter. However, in each instance, at a minimum, the application must contain: (1) an analysis showing the desired-to-undesired signal ratios, in addition to providing as a separate exhibit document: (2) a further analysis or demonstration that the applicant's proposed MDS station will provide the equivalent of protection from harmful interference to the authorized or previously-proposed cochannel MDS station, as would be provided to that authorized or previously-proposed station by the 45 dB desired-to-undesired signal strength ratio of Section 21.902(f). For example, an applicant may file a demonstration that the transmitters of both affected stations are designed with frequency tolerances to enable operation on a frequency offset basis which is equivalent to the 45 dB desired-to-undesired signal ratio standard. In the alternative, applicants may submit voluntary agreements or consent statements.

52. We also agree with the Association that insufficient data has been provided to the Commission and insufficient experience has accumulated to enable us to establish a desired-to-undesired signal ratio standard to define harmful interference for cochannel MDS stations when precision offset or a frequency offset transmitter is used. This must be left for a future rulemaking proceeding. We are especially concerned about the imminent transition from analog to digital transmissions for MDS stations and the effect of frequency offset transmitters on that transition. For example, data has not been submitted to the Commission as yet about the actual effect of a digital compression transmission on the signals of an MDS station using an analog transmitter, whether or not frequency offset is used. Therefore, it is possible that our authorization of an involuntary frequency offset may frustrate the subsequent conversion of that particular MDS station to digital compression technology. This is not a desirable result. Thus, we will not make any fundamental changes in these rules at this time.[14]

53. However, in a *Report and Order* in MM Docket No. 94-131 adopted today, we note that interference analyses are no longer required to be filed routinely with MDS applications. Therefore, any interference analyses or demonstrations that must be filed by an applicant seeking to use the frequency offset technique as a method to reduce harmful interference to previously-proposed or authorized cochannel stations would be filed pursuant to a separate waiver request and justification, and not as a component of an application filed electronically.

V. CUT-OFF RULE CLARIFICATION

54. Although not directly before us in petitions for reconsideration, we take this opportunity to reaffirm that the cut-off rule adopted in this docket satisfies the Administrative Procedure Act ("APA"). Rules governing the timing and order in which applications are processed are procedural in nature, despite the fact that they may have the effect of limiting the opportunities for parties to file applications. *E.g., Neighborhood TV Co. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984) (hereinafter cited as *Neighborhood*); *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948 (6th Cir. 1971); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963). *See JEM Broadcasting Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (hereinafter cited as *JEM*). Indeed, the United States Court of Appeals in *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961) (hereinafter cited as *Ranger*), held that a cut-off rule similar to the one adopted in

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[14] By letter dated February 7, 1995, the Wireless Cable Association International, Inc. stated that it was requesting that the Commission not revise its rules and policies on interference protection for MDS stations when frequency offset proposals are submitted, in light of the coming transition to digital technology. However, we had not previously interpreted any portion of the trade association's reconsideration petition as requiring such revisions, but viewed it as a request for clarification of previously-adopted policies. We are making no changes in our frequency offset rules or policies in this order. We initially intended to evaluate involuntary MDS frequency offset proposals on a case by case basis, and we will continue to do so. Thus, this clarification complies with the request in petitioner's letter of February 7, 1995.

this proceeding was procedural. The Court in *Ranger* noted that even though "a failure to observe" a cut-off rule "might cause the loss of substantive rights," "this possibility does not make a procedural regulation a substantive one." 294 F.2d at 244. Like the cut-off rule in *Ranger*, the cut-off rule adopted in this proceeding does not involve substantive rights. Its purpose and effect is to establish in part the way in which applications will be processed. It does not preclude any person from filing a MDS application, nor does it "change the substantive standards by which the FCC evaluated license applications." *JEM*, 22 F.3d at 327 (emphasis omitted).

55. In the *First Reconsideration Order*, we stated that making the cutoff rule effective upon Federal Register publication will "preclude some entities from filing wireless cable applications." 6 FCC Rcd at 6779. We now clarify what we meant by this statement. MDS was an existing service long before the rules adopted in this proceeding.[15] Interested persons had opportunities to file an application for this service long before the cut-off rule now in effect was adopted, and the other rule changes made in this proceeding did not create any new opportunities that were somehow foreclosed by the new cut-off rule. We recognize that one effect of the rule is to deny persons who failed to avail themselves of earlier opportunities, and instead filed after the cut-off date, the right to receive comparative consideration with earlier filed applications. This effect, however, occurs virtually anytime the Commission adopts or modifies a cut-off rule and applies the new rule to an existing service.

56. The APA by its express terms exempts procedural rules from the notice and comment requirements governing substantive rules, 5 U.S.C. § 553(b)(A), and thus the Commission was not required to provide any notice or comment before modifying its cut-off procedures. *See Ranger, supra*. In any event, as we pointed out in the *First Reconsideration Order*, 6 FCC Rcd at 6778, the *Notice* in this docket specified the Commission's intention to consider the adoption of a same day cut-off procedure and provided interested persons with the opportunity to comment upon that proposal. Thus, even if the procedural rule exemption did not apply, the procedures used by the Commission fully satisfied the notice and comment provisions of the APA.

57. Similarly, the APA requires only "substantive rules" to be published not less than 30 days before their effective date, 5 U.S.C. § 553(d). Because the cut-off rule is a procedural rule, rather than a substantive rule, it also is exempt from the 30 day advance

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[15] The service was created by an allocation order adopted by the Commission in January of 1974. *Amendment of Parts 1, 2, 21, and 43 of the Commission's Rules and Regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616 (1974).

publication requirement.[16] In any event, as we explained previously, there was good cause for making the cut-off rule effective on less than 30 days notice.[17]

58. The same day cut-off rule is a reasonable response to the abuses arising from the old cut-off procedures, such as the practice of some parties to file speculative applications by merely copying existing applications (including engineering data), and resubmitting them with the names changed. These speculators often would seek a financial settlement with the initial applicants who had undergone the trouble and expense of locating a market that can support a viable wireless cable system and had expended the resources necessary to prepare the necessary applications.[18] The problems of speculative applications have been exacerbated by the practice of "application mills" to flood the Commission with speculative, mass produced applications. The "application mills" are in the business of preparing applications with the Commission, and thus have a financial interest in filing as many applications as possible. Through mass mailings and telephone operations, the application mills solicit prospective clients to file multiple applications with the Commission, whether or not those persons have any intention of constructing and operating a communications system. The short cut-off period adopted in this proceeding precludes speculators from receiving comparative consideration with the applications they copy. *See First Reconsideration Order*, 6 FCC Rcd at 6778.

59. Moreover, the Commission reasonably determined that this type of abuse of its processes should be corrected as soon as possible. For this reason, the Commission found that the public interest would be served by making the rule take effect immediately upon its publication in the *Federal Register*.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

60. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

61. **Need and purpose of this action**: This second reconsideration order revises rules governing the Multipoint Distribution Service, in order to expand the protection from harmful interference of Multipoint Distribution Service stations and to increase the efficiency of processing Multipoint Distribution Service applications, so as to facilitate wireless cable service. This action furthers the Commission's goals of encouraging the development of

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[16] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979) (APA distinguishes between procedural rules and substantive rules); *Neighborhood*, 742 F.2d at 637 (procedural rules are the "opposite" of substantive rules).

[17] *See Reconsideration Order*, 6 FCC Rcd at 6779.

[18] *See id.*, 6 FCC Rcd at 6778; Reply Comments of Wireless Cable Association (June 20, 1990) at 15.

competitive communications systems and of promoting efficiency in the allocation, licensing and shared use of the electromagnetic spectrum.

62. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** There were no comments submitted in response to the Initial Regulatory Flexibility Analysis and none in connection with this second reconsideration order.

63. **Significant alternatives considered**: The Commission considered retaining the current definition of an MDS station's protected service area. In response to the pleadings received in this proceeding, we decided to expand the protection to be provided to MDS stations in order to enhance the potential for effective competition with traditional wireline cable systems.

64. On reconsideration, it was requested that some of the required delay in the processing of MDS applications be diminished by establishing that ITFS notice, when required, occur at an earlier time. For the same reason, the period of time provided for the filing of ITFS petitions to deny was reduced from 60 to 30 days.

65. The Commission also considered establishing a specific desired-to-undesired signal ratio to define harmful interference to an MDS station when one station uses a frequency offset transmitter. We decided to continue to use the definition of cochannel harmful interference provided at Section 21.902(f).

66. The Secretary shall send a copy of this *Second Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq*. (1981)).

67. The rule changes adopted here have been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose new or modified collection requirements on the public. This proposed change in the information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. ORDERING CLAUSES

68. For the reasons set forth above, Part 21 of the Commission's Rules ARE HEREBY AMENDED as discussed herein and as shown in Appendix A. IT IS FURTHER ORDERED that the rule changes set forth in Appendix A will become effective on October 1, 1995, except the revision of Section 21.902(d) which will become effective on the 60th day after publication of a summary of this order in the *Federal Register*.

69. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C.

Sections 154(i) and 303(r), and Section 1.429(i) of the Commission's Rules, 47 C.F.R. Section 1.429(i), the Partial Petition for Reconsideration filed in this proceeding IS GRANTED to the extent indicated herein, and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 21 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21 - Domestic Public Fixed Radio Services

1. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552, 554.

2. Section 21.902 is amended by revising paragraphs (d) and (i) to read as follows:

Sec. 21.902. Frequency interference.

* * * * *

(d) Subject to the limitations contained in subsection (e) of this section, each MDS station licensee shall be protected from harmful electrical interference, as determined by the theoretical calculations, within a protected service area of which the boundary will be 56.3255 kilometers (35 miles) from the transmitter site.

* * * * *

(i)(1) For each initial application for a new station, or amendment thereto, or modification application, or amendment thereto, proposing Multipoint Distribution Service (MDS) facilities on E, F or H channels, filed on October 1, 1995 or thereafter, on the day the application or amendment is filed, the applicant must prepare but is not required to submit with its application or amendment, an analysis demonstrating that operation of the MDS applicant's transmitter will not cause harmful interference to each registered receive site of any existing D, E, F or G channel Instructional Television Fixed Service (ITFS) station, licensed or with a construction permit authorized on the day such MDS application is filed, with an ITFS transmitter site within 50 miles of the coordinates of the MDS station's proposed transmitter site.

(A) In the alternative, an applicant for an MDS station may submit a statement from the ITFS licensee or construction permittee stating that the ITFS licensee or construction permittee does not object to operation of the MDS station.

(B) In the alternative, an applicant for an MDS station may submit an analysis demonstrating that there are no ITFS licensees or construction permittees as described in (i)(1) of this paragraph within 50 miles of the coordinates of the proposed transmitter site of the MDS station.

(2) For each application described in (i)(1) of this paragraph, the applicant must serve, by certified mail, return receipt requested, on or before the day the application or amendment described in (i)(1) of this paragraph is initially filed with the Commission, a copy of the complete MDS application or amendment, including each exhibit and interference study, described in (i)(1) of this paragraph, on each ITFS licensee or construction permittee described in (i)(1) of this paragraph.

(3) For each application described in (i)(1) of this paragraph, the applicant must certify and file, with the application or amendment, its certification of its compliance with the requirements of (i)(2) of this paragraph;

(4) For each application described in (i)(1) of this paragraph, the applicant must file, on or before the 30th day after the application or amendment described in (i)(1) of this paragraph is initially filed with the Commission, a written notice which contains the following:

(i) caption -- ITFS Service Notice;

(ii) applicant's name, address, proposed service area and channel group, and application file number, if known;

(iii) a list of each ITFS licensee and construction permittee described in (i)(1) of this paragraph;

(iv) the address of each ITFS licensee and construction permittee described in (i)(1) of this paragraph used for service; and

(v) a list of the date each ITFS licensee and construction permittee described in (i)(1) of this paragraph received a copy of the complete application or amendment described in (i)(1) of this paragraph, or a notation of lack of receipt by the ITFS licensee or construction permittee of a copy of the complete application or amendment, on or before such 30th day, together with a description of its efforts for receipt by each such licensee or construction permittee lacking receipt of the application.

(5) The public notices described in (i)(6) of this paragraph are as follows:

(A) For initial applications for new MDS stations which participate in a lottery, this public notice is the notice announcing the selection of the applicant's application by lottery for qualification review.

(B) For initial applications for new MDS stations which participate in a competitive bidding process, this public notice is the notice announcing the application of the winning bidder in the competitive bidding process has been accepted for filing.

(C) For initial applications for new MDS stations which do not participate in a lottery or a competitive bidding process, this public notice is the notice announcing that the applicant's application is not mutually-exclusive with other MDS applications.

(D) For MDS modification applications, this public notice is the notice announcing that the modification application has been accepted for filing.

(6)(i) Notwithstanding the provisions of Sections 1.824(c) and 21.30(a)(4), for each application described in (i)(1) of this paragraph, each ITFS licensee and each ITFS construction permittee described in (i)(1) of this paragraph may file with the Commission on or before the 30th day after the public notice described in (i)(5) of this paragraph, a petition to deny the MDS application.

(ii) Except for the requirements as to the filing time deadline, this petition to deny must otherwise comply with the provisions of Section 21.30 of this Part.

(iii) In addition, this ITFS petition to deny must:

(A) identify the subject MDS application, including the applicant's name, station location, channel group, and application file number;

(B) include a certificate of service demonstrating service on the subject MDS applicant by certified mail, return receipt requested, on or before the 30th day after the MDS public notice described in (i)(5) of this paragraph;

(C) include a demonstration that it made efforts to reach agreement with the MDS applicant but was unable to do so;

(D) include an engineering analysis that operation of the proposed MDS station will cause harmful interference to its ITFS station;

(E) include a demonstration, in those cases in which the MDS applicant's analysis is dependent upon modification(s) to the ITFS facility, that the harmful interference cannot be avoided by the proposed substitution of new or modified equipment to be supplied and installed by the MDS applicant, at no expense to the ITFS licensee or construction permittee; and

(F) be limited to raising objections concerning the potential for harmful interference to its ITFS station or concerning a failure by the MDS applicant to serve the ITFS licensee or construction permittee with a copy of the complete application or amendment described in (i)(1) of this paragraph.

(iv) The Commission will presume an ITFS licensee or construction permittee described in (i)(1) of this paragraph has no objection to operation of the MDS station, if the ITFS licensee or construction permittee fails to file a petition to deny by the deadline prescribed in (i)(6)(i) of this paragraph.

* * * * *